No. 3993

United States

Circuit Court of Appeals

For the Ninth Circuit.

F. L. DENMAN,

Plaintiff in Error,

vs.

CHARLES RICHARDSON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

FISHBURNE, GEORGE P., 1518 Puget Sound Bank Building, Tacoma, Washington,
Attorney for Plaintiff in Error.

DENMAN, A. H., National Realty Building, Tacoma, Washington,
Attorney for Plaintiff in Error.

KERR, J. A., 1309–16 Hoge Building, Seattle, Washington,
Attorney for Defendant in Error.

McCORD, EVAN S., 1309–16 Hoge Building, Seattle, Washington,
Attorney for Defendant in Error.

IVEY, J. N., 1309–16 Hoge Building, Seattle, Washington,
Attorney for Defendant in Error. [1*]

In the Superior Court of the State of Washington in and for the County of Pierce.

No. 2791.

FREDERICK L. DENMAN and FREDERICK L. DENMAN as Agent and Attorney in Fact for CHARLES A. MILLER, A. H. DENMAN, PERCY E. RADLEY, J. H. WRENTMORE, W. BOYD SHANNON, J. HUNTER RAMSEY, W. ARCHIBALD, F. C. HEWSON and THOMAS LARSEN,
Plaintiffs,

vs.

CHARLES RICHARDSON,
Defendant.

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*Page-number appearing at foot of page of original certified Transcript of Record.

Complaint.

Come now the above-named plaintiffs and complaining of the above-named defendant for a first cause of action, allege as follows:

I.

That on and prior to January, 1912, and at all times hereinafter mentioned, the Pacific Cold Storage Company was a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in Tacoma, Pierce County, Washington, and that Charles Richardson acted as president of said company, and drew a salary as such president from January 1st, 1912, until the first day of October, 1918, and as one of the trustees actively managing the affairs of said company from January 1st, 1912, to date.

II.

That the corporation had a capital stock of Ten Thousand (10,000) shares, of the par value of One Hundred ($100.00) Dollars each, or One Million ($1,000,000.0) Dollars, [2] and that the following named parties are now, and at all times herein mentioned were, the lawful owners of the number of shares set opposite their respective names, to wit:

Charles A. Miller	798 Shares
A. H. Denman	40 Shares
Percy E. Radley and J. H. Wrentmore	125 Shares
W. Boyd Shannon	50 Shares
J. Hunter Ramsey	40 Shares

W. Archibald .....186 Shares
F. C. Hewson ..... 1 Share
Thomas Larsen ..... 25 Shares
Frederick L. Denman ..... 60 Shares

and that each one of the parties above named duly made, constituted and appointed Frederick L. Denman as their agent and attorney in fact to bring the above-entitled action, and take such other and further legal steps as might seem proper in the premises.

III.

That while acting as said president and trustee of said corporation, said Charles Richardson wilfully, wrongfully and unlawfully converted to his own use, the following sums of money from the dividends of said company, on the following dates, to wit:

Date.	Amount Taken.	Dividend.
January 1912	$2,500.00	$100,000.00
January 1913	2,500.00	100,000.00
January 1914	2,500.00	100,000.00
January 1915	1,500.00	60,000.00
January 1916	2,000.00	80,000.00
January 1917	2,000.00	80,000.00
January 1918	5,000.00	200,000.00
Total taken	$18,000.00	
on total dividends		720,000.00

[3]

And that from January 1st, 1912, to and including January, 1918, the said defendant Charles Richardson, without any consideration, wilfully, wrong-

fully and unlawfully converted to his own use the dividends of the following parties in the amounts set opposite their respective names, to wit:

Charles A. Miller	$1,436.40
Fredrick L. Denman	108.00
A. H. Denman	72.00
Percy E. Radley and J. H. Wrentmore	225.00
W. Boyd Shannon	90.00
J. Hunter Ramsey	72.00
W. Archibald	334.80
F. C. Hewson	1.80
Thomas Larsen	45.00

and that there is now due Fredrick L. Denman, individually, on account thereof, the sum of One Hundred Eight ($108.00) Dollars, and as agent and attorney in fact of the above-named shareholders, the total sum of Two Thousand Two Hundred Seventy-seven ($2,277.00) Dollars.

And plaintiff further alleges as a second cause of action, as follows:

I.

That on, and prior to January, 1912, and at all times hereinafter mentioned, the Pacific Cold Storage Company was a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business in Tacoma, Pierce County, Washington, and that Charles Richardson acted as president of said company, and drew a salary as such president from January 1st, 1912, until the first day of October, 1918, and as one of the trustees actively

managing the affairs of said company from [4] January 1st, 1912, to date.

II.

That the corporation had a capital stock of Ten Thousand (10,000.00) shares, of the par value of One Hundred ($100.00) Dollars each, or One Million ($1,000,000.00) Dollars, and that the following named parties are now, and at all times herein mentioned were, the lawful owner of the number of shares set opposite their respective names, to wit:

Charles A. Miller .....798 Shares
A. H. Denman ..... 40 Shares
Percy E. Radley and J. H. Wrentworth .....125 Shares
more .....125 Shares
W. Boyd Shannon .....50 Shares
J. Hunter Ramsey .....40 Shares
W. Archibald .....186 Shares
F. C. Hewson ..... 1 Share
Thomas Larsen .....25 Shares
Fredrick L. Denman .....60 Shares

and that each one of the parties above named duly made, constituted and appointed Frederick L. Denman as their agent and attorney in fact to bring the above-entitled action, and take such other and further legal steps as might seem proper in the premises.

III.

That the Pacific Cold Storage Company did no new business after May 1st, 1918, and on May 31st, 1918, the stockholders unanimously voted to dissolve

said corporation, and said company was in process of liquidation from then on until July 1st, 1919, and that on September 15th, 1918, the trustees paid to the shareholders of said company Five Hundred Thousand ($500,000.00) Dollars of the capital return of said Pacific Cold Storage [5] Company, and on June 3d, 1919, said trustees paid the sum of Five Hundred Thousand ($500,000.00) Dollars of said capital return, and that on January 1st, 1919, the said Charles Richardson, while acting as trustee of said company, without any consideration whatever, wrongfully and unlawfully appropriated to his own use, the sum of Twenty-five Thousand ($25,000.00) Dollars of the capital stock of said company, and on June 3d, 1919, said Charles Richardson while acting as such trustee, misappropriated the sum of Twenty-five Thousand ($25,000.00) Dollars of said capital stock, and that on January 1st, 1919, and on June 3d, 1919, the said Charles Richardson, while acting as trustee of said company, without any consideration, wilfully, wrongfully and unlawfully misappropriated from the capital stock belonging to Charles A. Miller, Fredrick L. Denman, A. H. Denman, Percy E. Radley, J. H. Wrentmore, W. Boyd Shannon, J. Hunter Ramsey, W. Archibald, F. C. Hewson and Thomas Larsen, the sum of Six Thousand Six Hundred Twenty-five ($6,625.00) Dollars, and that there is now due and owing Fredrick L. Denman, individually on account thereof, the sum of Three Hundred ($300.00) Dollars and Fredrick L. Denman, as the agent and attorney in fact of Charles A. Miller, and the other stock-

holders just above named the sum of Six Thousand Three Hundred Twenty-five ($6,325.00) Dollars.

WHEREFORE Fredrick L. Denman prays judgment against Charles Richardson in the sum of Four Hundred Eight ($408.00) Dollars, and Fredrick L. Denman, as the agent and attorney in fact for Charles A. Miller, and the other stockholders for whom he is agent, above named, in the sum of Eight Thousand Six Hundred and Two ($8,602.00) Dollars.

GEORGE P. FISHBURNE,
Attorney for Plaintiffs.

Office and Postoffice Address: 608 National Bank of Tacoma Bldg., Tacoma, Washington. [6]

A. H. DENMAN,
Attorney for Plaintiffs.

Office and Postoffice Address: National Realty Bldg., Tacoma, Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington. Oct. 3, 1919. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [7]

Answer.

Comes now the defendant Charles Richardson by his attorneys, Kerr & McCord, and for answer to the complaint of plaintiffs, says:

I.

Referring to paragraph one of the first cause of action, he admits the allegations therein contained.

II.

Referring to paragraph two of said first cause of action, he admits that the corporation therein referred to had a capital stock of ten thousand shares and denies each and every other allegation therein contained.

III.

Referring to paragraph three he denies each and every allegation therein contained, and denies that he converted either the amounts set opposite the names of the parties in said paragraph, or any other sum or sums whatsoever.

IV.

Referring to paragraph one of plaintiffs' second cause of action, he admits the allegations therein contained. [8]

V.

Referring to paragraph two of plaintiffs' second cause of action, he admits that the corporation therein referred to had a capital stock of ten thousand shares, and he denies each and every other allegation in said paragraph contained.

VI.

Referring to paragraph three of said second cause of action, he denies each and every allegation therein contained and denies specifically that he appropriated the sum of $25,000.00 of the capital stock of said company, or any other amount of said capital stock and denies specifically that he misappropriated the sum of $6,625.00 therein referred to, or any other sum or sums whatsoever, and denies

specifically that there is now due and owing plaintiffs on account of the matters and things therein referred to the sum of $6,325.00 or in any other sum or sums whatsoever.

WHEREFORE, having fully answered, this defendant prays the Court that this action be dismissed with his costs and disbursements.

KERR & McCORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 1, 1919. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [9]

Demurrer to Amended Complaint.

Comes now the defendant above named and demurring to the amended complaint of the plaintiffs on file herein, for cause of demurrer alleges:

I.

That there is a defect of parties plaintiff.

II.

That there is a defect of parties defendant.

III.

That several causes of action have been improperly united.

IV.

That the complaint does not state facts sufficient to constitute a cause of action.

V.

That the action has not been commenced within the time limited by law.

KERR & McCORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 3, 1920. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [15]

Demurrer to Fifth Amended Complaint.

Comes now the defendant above named and demurring to the first cause of action stated in the fifth amended complaint, for cause of demurrer, says:

I.

That there is a defect of parties plaintiff.

II.

That there is a defect of parties defendant.

III.

That several causes of action have been improperly united.

IV.

That the complaint does not state facts sufficient to constitute a cause of action.

V.

That the action has not been commenced within the time limited by law.

And further demurring to the second cause of action stated in the fifth amended complaint for cause of demurrer, this defendant alleges:

I.

That there is a defect of parties plaintiff.

II.

That there is a defect of parties defendant.

III.

That several causes of action have been improperly united.

IV.

That the complaint does not state facts sufficient to constitute a cause of action.

V.

That the action has not been commenced within the time [36] limited by law.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Sep. 15, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [37]

Order on Demurrer to Fifth Amended Complaint.

The Court having considered the demurrer to the fifth amended complaint and filed its opinion herein and finding that there is a misjoinder of parties plaintiff as to Frederick L. Denman and Frederick L. Denman as agent for A. H. Denman, F. C. Hewson and Thomas Larsen and that Frederick L. Denman has not capacity to sue for said A. H. Denman, F. C. Hewson and Thomas Larsen,—

WHEREFORE IT IS ORDERED that the above-entitled action as to Frederick L. Denman, as agent and attorney in fact for A. H. Denman, Thomas Larsen and F. C. Hewson, be and is hereby dismissed without prejudice and that the plaintiff Frederick L. Denman be allowed to file an amended complaint herein within ten days.

Done in open court this 26 day of September, 1921.

JEREMIAH NETERER,
Judge.

To the above ruling the plaintiffs and each one of them except on the following grounds:

I.

That the defendant waived his right to object to a misjoinder of the parties plaintiff by moving for the transfer of this case from the state to the Federal court on the ground of diversity of citizenship of the plaintiffs and the defendant and that the amount in controversy exceeded $3,000.00 exclusive of interest and costs. The reason of this exception is that the claims of A. H. Denman, F. C. Hewson and Thomas Larsen are each far below $3,000.00 and do not even exceed $500.00 apiece and could not have been tried in the Federal court unless they had been joined with other claims, which brought them to $3,000.00 and over. The defendant took advantage of the misjoinder to gain federal jurisdiction and then attempts to throw the plaintiff out of court [38] because of this same misjoinder.

II.

That the defendant by his own laches has lost

his right to raise the objection *os* misjoinder of causes of action or the incapacity of any one of the plaintiffs to sue because if any one of the claims of the plaintiff are dismissed from this action he cannot begin a new suit on account of their being barred by the statute of limitations since this action was commenced, and on the further ground that this objection is known as a dilatory plea and that such pleas must not only be made but ruled upon at the beginning of an action so that plaintiffs can begin immediately a new action.

The above exceptions be and are hereby allowed this 26th day of September, 1921.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Sep. 26, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [39]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 2791.

FREDERICK L. DENMAN,
Plaintiff,

vs.

CHARLES RICHARDSON,
Defendant.

Seventh Amended Complaint.

The plaintiff complains of the defendant and for a first cause of action alleges:

FIRST CAUSE OF ACTION.

I.

That from the 8th day of April, 1897, until the first day of May, 1918, The Pacific Cold Storage Company was a corporation organized and doing business under the laws of the State of Washington having its principal place of business in the City of Tacoma in Pierce County in said state; that after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular annual meeting of the stockholders of said corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due to it and distribute the proceeds and all accumulated funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of its assets and paid all of its debts and was dissolved on or before July, 1, 1919, and that a formal order of dissolution was made and entered on the 2d day of June, 1919, in the Supreme Court of the State of Washington in and for Pierce County. [48]

II.

That the capital of said corporation from and

after April 10, 1901, was the sum of One Million Dollars, divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Frederick L. Denman owned 60 of said shares; that said shareholder remained at all times since owner of the funds of said corporation to be distributed to him upon dissolution on his shares as such former stockholder.

III.

That during the existence of the said Pacific Cold Storage Company the profits realized from its business each year were in part declared to be dividends and to the amount so declared paid as dividends to the shareholders of said corporation; that the profits not so declared to be dividends were retained and accumulated by said company and at the time said company ceased to do business and dissolved were available for distribution and said accumulated profits were then distributed to said shareholders, with the exception of the portion unlawfully appropriated by defendant as stated in following paragraphs.

IV.

That in each year commencing with the year 1912 and ending with the year 1918 the defendant, without authority from said corporation, its trustees or its stockholders, and while acting as trustee and president, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds and undivided profits an amount equal to two and one-half per cent of amount paid

to said shareholders as dividends, as follows, to wit: [49]

Date	Dividend	Amount Taken
January, 1912	$100,000.00	$2500.00
January, 1913	100,000.00	2500.00
January, 1914	100,000.00	2500.00
January, 1915	60,000.00	1500.00
January, 1916	80,000.00	2000.00
January, 1917	80,000.00	2000.00
January, 1918	200,000.00	5000.00
Total Dividends	$720,000.00	
Total taken by Defendant	$18,000.00	

V.

That of the amounts so wrongfully and unlawfully taken as above set forth there belonged to the stock of F. L. Denman and became due thereon from the defendant on dissolution of said corporation the sum of $108.00 and interest on said amount at the legal rate of six per cent per annum from and after the 31st day of May, 1918, the date of the dissolution of said company, which amount the defendant refuses to pay although demanded of him prior to the commencement of this action.

VI.

That complying with the order of the Court requiring plaintiff to state in his complaint the time when he acquired shares in said corporation plaintiff alleges: That the defendant and his attorneys now have in their possession and located in the office of defendant's attorneys all of plaintiff's certificates of stock together with the stock certificate book

and the stock ledger of said corporation whereby such times and amounts can be ascertained by them readily and with certainty. That F. L. Denman acquired his said 60 shares in amounts and about the times stated as follows, to wit: 1 share some time in the year [50] 1901; 39 shares in June, 1910; and 20 shares in April, 1912.

For a second cause of action against the defendant plaintiff alleges:

SECOND CAUSE OF ACTION.

I.

That from the 8th day of April, 1897, until the first day of May, 1918, The Pacific Cold Storage Company was a corporation organized and doing business under the laws of the State of Washington having its principal place of business in the City of Tacoma in Pierce County in said state; that after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular annual meeting of the stockholders of said corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due to it and distribute the proceeds and all accumulated funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of its assets and paid all of its debts and was dissolved on or before July 1, 1919, and that a formal order of dissolution was made and entered on

the 2d day of June, 1919, in the Superior Court of the State of Washington in and for Pierce County.

II.

That the capital of said corporation from and after April 10, 1901, was the sum of One Million Dollars divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Charles A. Miller owned 798 of said shares; that said shareholders remained [51] at all times since owners of the funds of said corporation to be distributed to them upon dissolution on their shares as such former stockholders save and except only that Charles A. Miller transferred his interest in the subject matter of this action as stated in the following paragraph.

III.

That the said Charles A. Miller by assignment in writing made since the commencement of this action conveyed to said Frederick L. Denman all right, title and interest of said Charles A. Miller to claims against the defendant for which recovery is sought in this action, a copy of which said assignment is hereto attached marked Exhibit "A" and made a part of this complaint.

IV.

That during the existence of the said Pacific Cold Storage Company the profits realized from its business each year were in part declared to be dividends and to the amount so declared paid as dividends to the shareholders of said corporation; that the profits not so declared to be dividends were re-

tained and accumulated by said company and at the time said company ceased to do business and dissolved were available for distribution and said accumulated profits were then distributed to said shareholders with the exception of the portion unlawfully appropriated by defendant as stated in following paragraphs.

V.

That in each year commencing with the year 1912 and ending with the year 1918 the defendant, without authority from said corporation, its trustees or its stockholders, and while acting as trustee and president, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds [52] and undivided profits an amount equal to two and one-half per cent of amount paid to said shareholders as dividends; as follows, to wit:

Date	Dividend	Amount Taken
January, 1912	$100,000.00	$2500.00
January, 1913	100,000.00	2500.00
January, 1914	100,000.00	2500.00
January, 1915	60,000.00	1500.00
January, 1916	80,000.00	2000.00
January, 1917	80,000.00	2000.00
January, 1918	200,000.00	5000.00
Total Dividends	$720,000.00	
Total taken by Defendant		$18,000.00

VI.

That of the amounts so wrongfully and unlawfully taken as above set forth there belonged to the

stock of Charles A. Miller and became due thereon from the defendant on the dissolution of said corporation the sum of $1436.40 and interest on said amount at the legal rate of six per cent per annum from and after the 31st day of May, 1918, the date of the dissolution of said company, which amount the defendant refuses to pay although demanded of him prior to the commencement of this action.

VII.

That complying with the order of the court requiring plaintiff to state in his complaint the time when he acquired shares in said corporation plaintiff alleges: that the defendant and his attorney now have in their possession and located in the office of defendant's attorneys all of plaintiff's certificates of stock together with the stock certificate book and the stock ledger of said corporation whereby such times and amounts can [53] be ascertained by them readily and with certainty. Said Charles A. Miller has owned 1058 shares of said capital, of which prior to the year 1918 he had 260 shares, leaving as hereinbefore stated 798 shares, which he has owned since April, 1917, and until his said conveyance to F. L. Denman; that to the best of plaintiff's information, knowledge and belief said Miller acquired his stock in amount and on or about the times stated as follows, to wit: 30 shares August 15, 1911; 100 shares December 9, 1911; 200 shares April 17, 1912; 100 shares March 19, 1913; 100 shares April 29, 1913; 100 shares October 17, 1913; 70 shares March, 1914; 100 shares March, 1914; 100

shares August 10, 1915; 158 shares March, 1917. That said Miller sold 80 shares in March, 1912; 100 shares in March, 1913; 15 shares in March, 1914, 15 shares in October, 1916, 20 shares in March, 1917; 25 shares in March, 1917; and 5 shares in April, 1917.

For a third cause of action against the defendant plaintiff alleges:

THIRD CAUSE OF ACTION.

I.

That from the 8th day of April, 1897, until the first day of May, 1918, The Pacific Cold Storage Company was a corporation organized and doing business under the laws of the State of Washington having its principal place of business in the City of Tacoma in Pierce County in said state; that after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular annual meeting of the stockholders of said corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due it and distribute the proceeds and all accumulated [54] funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of its assets and paid all of its debts and was dissolved on or before July 1, 1919, and that a formal order of dissolution was made and entered on

the 2d day of June, 1919, in the Superior Court of the State of Washington in and for Pierce County.

II.

That the capital of said corporation from and after April 10, 1901, was the sum of One Million Dollars, divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Frederick L. Denman owned 60 of said shares; that said shareholder remained at all times since owner of the funds of said corporation to be distributed to him upon dissolution in proportion to his shares as such former stockholder.

III.

That while acting as such trustee for the shareholders after said company had ceased to do business, the defendant without any consideration whatever, wrongfully, and unlawfully appropriated to his own use from the capital return of said corporation, certain sums at the times and in the amounts stated as follows, to wit: In or about the month of January, 1919, the sum of $25,000.00; in or about the month of June, 1919, the sum of $25,000.00; and in or about the month of January, 1920, the sum of $2500.00, making a total of funds so misappropriated by the defendant, to his own use in the amount of $52,500.00. That the amount so taken was $5.25 for each share and included $315.00 belonging to F. L. Denman on his 60 shares. [55]

IV.

That there is now, therefore, due and owing from

the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $315.00 together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920. That before the commencement of this action plaintiff demanded payment of the sum of money above set forth from the defendant, who has paid no part of the same.

V.

That the defendant has possession of and there is now in his custody in the office of his attorneys in this action all of plaintiff's certificates of stock together with the stock certificate book and the stock ledger of said corporation whereby the times and amounts when plaintiff became the owner of his said shares of stock can be ascertained by the defendant and his attorney readily and with certainty; that plaintiff has owned his said 60 shares since the month of April, 1912, when he acquired the last of his shares.

For a fourth cause of action against the defendant plaintiff alleges:

FOURTH CAUSE OF ACTION.

I.

That from the 8th day of April, 1897, until the first day of May, 1918, The Pacific Cold Storage Company was a corporation organized and doing business under the laws of the State of Washington having its principal place of business in the City of Tacoma in Pierce County in said state; that after May 1, 1918, said corporation ceased to do business and on May 31, 1918, at the regular an-

nual meeting of the stockholders of said [56] corporation for that year said stockholders voluntarily and unanimously voted to dissolve said corporation and instructed its officers and trustees to sell all of its property, collect all money due it and distribute the proceeds and all accumulated funds to its stockholders; that from and after the first day of May, 1918, the said company did no new business and abandoned the purposes for which it was incorporated and disposed of an integral and major part of its assets and paid all of its debts and was dissolved on or before July 1, 1919, and that a formal order of dissolution was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington in and for Pierce County.

II.

That the capital of said corporation from and after April 10, 1901, was the sum of One Million Dollars, divided into ten thousand shares of the par value of One Hundred Dollars each. That at the time said corporation ceased to do business Charles A. Miller owned 798 of said shares and said shareholders remained at all times since owners of the funds of said corporation to be distributed to them upon dissolution in proportion to their shares as such former stockholders save and except, of course, that Charles A. Miller transferred his interest in the subject matter of this action as stated in the following paragraphs.

III.

That the said Charles A. Miller by assignment in

writing made since the commencement of this action conveyed to said Frederick L. Denman all right, title and interest of said Charles A. Miller to claims against the defendant for which recovery is sought in this action, a copy of which said assignment is [57] hereto annexed marked Exhibit "A" and made a part of this complaint.

IV.

That while acting as such trustee for the shareholders after said company had ceased to do business, the defendant without any consideration whatever, wrongfully and unlawfully appropriated to his own use from the capital return of said corporation, certain sums at the times and in the amounts stated as follows, to wit: In or about the month of January, 1919, the sum of $25,000.00; in or about the month of June, 1919, the sum of $25,000.00; and in or about the month of January, 1920, the sum of $2500.00, making a total of funds so misappropriated by the defendant, to his own use in the amount of $52,500.00. That the amount so taken was $5.25 for each share and included $4189.50 belonging to said Charles A. Miller on his 798 shares.

V.

That there is now, therefore, due and owing from the said Charles Richardson for money so had and received by him to the use of the plaintiff the sum of $4189.50, together with interest at the legal rate of six per cent per annum on said amount from and after the month of January, 1920. That before the commencement of this action plaintiff de-

manded payment of the sum of money above set forth from the defendant, who has paid no part of the same.

VI.

That the defendant has possession of and there is now in his custody in the office of his attorneys in this action all of plaintiff's certificates of stock together with the stock certificate book and the stock ledger of said corporation whereby the times and amounts when plaintiff became the owner of [58] his said shares of stock can be ascertained by the defendant and his attorneys readily and with certainty; that to the best of plaintiff's knowledge and belief the said Charles A. Miller has owned his said 798 shares since the month of April, 1917, until his conveyance thereof to the plaintiff F. L. Denman as above stated.

WHEREFORE plaintiff prays judgment against the defendant Charles Richardson in the sum of $6048.90, with interest at six per cent per annum on $1544.40 thereof from the 31st day of May, 1918, and on $4504.50 thereof from and after the 31st day of January, 1920, and for his costs and disbursements herein.

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff.

1518 Puget Sound Bank Building, Tacoma, Washington.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Nov. 30, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [59]

Demurrer to Seventh Amended Complaint.

Comes now the defendant above named *a* demurring to the seventh amended complaint of the plaintiff, for cause of demurrer says:

I.

It demurs to the complaint setting forth the first cause of action upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is a defect of parties plaintiff and that there is a defect of parties defendant.

4. That several causes of action have been improperly united.

5. That the complaint does not state facts sufficient to constitute a cause of action.

6. That the action has not been commenced within the time limited by law.

II.

As to the second cause of action, the defendant demurs to the complaint upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is a defect of parties plaintiff, and that there is a defect of parties defendant.

4. That several causes of action have been improperly united. [60]

5. That the complaint does not state facts sufficient to constitute a cause of action.

6. That the action has not been commenced within the time limited by law.

III.

As to the third cause of action, the defendant demurs to the complaint upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is a defect of parties plaintiff and that there is a defect of parties defendant.

4. That several causes of action have been improperly united.

5. That the complaint does not state facts sufficient to constitute a cause of action.

6. That the action has not been commenced within the time limited by law.

IV.

As to the fourth cause of action, the defendant demurs to the complaint upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction of the person of the defendant or of the subject matter of the action.

2. That the plaintiff has no legal capacity to sue.

3. That there is a defect of parties plaintiff and that there is a defect of parties defendant.

4. That several causes of action have been improperly united.

5. That the complaint does not state facts sufficient [61] to constitute a cause of action.

6. That the action has not been commenced within the time limited by law.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 17, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [62]

Order Overruling Demurrer to Seventh Amended Complaint.

This cause came on for hearing January 16, 1922, upon the demurrer of the defendant to plaintiff's seventh amended complaint, and upon the written briefs of the parties thereafter delivered to the Court, plaintiff appeared by G. P. Fishburne and A. H. Denman, his attorneys, the defendant by E. S. McCord, one of his attorneys; and the Court upon due consideration overrules the demurrer, by memo decision filed Feb. 8, 1922—

It is therefore ORDERED AND ADJUDGED by the Court that the demurrer of the defendant to plaintiff's seventh amended complaint is insuffi-

cient in law and is hereby overruled and that the defendant have ten days in which to answer the said seventh amended complaint.

To that part of the foregoing order overruling the demurrer defendant excepts and his exception is by the Court allowed.

Dated this 23d day of March, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 24, 1022. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [63]

Answer to Seventh Amended Complaint.

Comes now the defendant above named and answering the seventh amended complaint of the plaintiff, for cause of answer says:

Answering the first cause of action:

I.

Referring to the first paragraph of the first cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington for Pierce

County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the first cause of action, defendant admits that the capital stock of the Pacific Cold Storage Company was $1,000,000, that the same was divided into 10,000 shares of the par value of $100 each; admits that on the date of the dissolution of the corporation said F. L. Denman was the owner of 60 shares of the capital stock of said corporation, but denies each and every other allegation in said paragraph contained. [64]

III.

Answering the third paragraph of the first cause of action, the defendant admits that the corporation, during the period of its existence, from year to year declared dividends; admits that certain funds were available for distribution among the stockholders at the time of the entry of the order of dissolution; defendant specifically denies that any portion of the assets of the Pacific Cold Storage Company was unlawfully appropriated by the defendant and denies each and every other allegation in said paragraph contained.

IV.

Answering the fourth paragraph of the first cause of action, defendant admits that the defendant was a trustee and president of the Pacific Cold Storage Company, denies that the defendant wrongfully or unlawfully misappropriated or converted to his own use any of the funds of the corporation; defendant admits the payment of dividends in 1912

to 1918, and that the total dividends approximated the sum of $720,000; denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the first cause of action, defendant admits that he has refused to pay to the plaintiff the sum of $108.00, but denies each and every other allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the first cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof. [65]

Answering the second cause of action:

I.

Referring to the first paragraph of the second cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the second cause of action, defendant admits that Charles A.

Miller, at the time of the dissolution of said corporation, was the owner of 798 shares of the capital stock of said corporation. Defendant denies each and every other allegation in said paragraph contained.

III.

Answering the third paragraph of the second cause of action, this defendant says that he has neither knowledge nor information as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the second cause of action, the defendant admits that the corporation during the period of its existence, from year to year declared dividends; admits that certain funds were available for distribution among the stockholders at the time of the entry of the order of dissolution; defendant specifically denies that any portion of the assets of the Pacific Cold Storage Company was unlawfully appropriated by the defendant and denies each and every other allegation [66] in said paragraph contained.

V.

Answering the fifth paragraph of the second cause of action, defendant admits that the defendant was a trustee and president of the Pacific Cold Storage Company, denies that the defendant wrongfully or unlawfully misappropriated or converted to his own use any of the funds of the corporation; defendant admits the payment of dividends in 1912

to 1918, and that the total dividends approixmated the sum of $720,000; denies each and every other allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the second cause of action, this defendant admits that he has failed to pay the sum of $1,436.40 mentioned in said paragraph, but denies each and every other allegation in said paragraph contained.

VII.

Answering the seventh paragraph of the second cause of action, defendant says he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

Answering the third cause of action:

I.

Answering the first paragraph of the third cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation, organized under the laws of the State of Washington, with its principal place of business in the city of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d day of J*uny,* 1919, in the Superior Court of the [67] State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the third cause of action, this defendant admits that the capi-

tal stock of the Pacific Cold Storage Company was the sum of $1,000,000 and that the plaintiff, Frederick L. Denman, was the owner of 60 shares of said stock at the time of dissolution, and denies each and every other allegation in said paragraph contained.

III.

Answering the third paragraph of the third cause of action, this defendant denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the third cause of action, this defendant admits that he has not paid the said sum of $315.00 mentioned in said paragraph; denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the third cause of action, this defendant says that he has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

Answering the fourth cause of action:

I.

Answering the first paragraph of the fourth cause of action, this defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of [68] business in the City of Tacoma, Pierce County, Washington; admits that a formal order

of dissolution of the corporation was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the fourth cause of action, this defendant admits that the capital stock of the Pacific Cold Storage Company at the time of its dissolution was $1,000,000 and that at the time of the dissolution Chas. A. Miller owned 798 shares of said stock. As to the remaining allegations of the paragraph, this defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

III.

Answering the third paragraph of the fourth cause of action, this defendant says that he has neither knowledge or information to form a belief as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the fourth cause of action, this defendant denies the same and each and every part thereof.

V.

Answering the fifth paragraph of the fourth cause of action, this defendant admits that he has not paid the sum of $4,198.50 mentioned therein;

denies each and every other allegation in said paragraph contained. [69]

VI.

Answering the sixth paragraph of the fourth cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

For a further and first affirmative defense to the seventh amended complaint of the plaintiff, this defendant alleges:

I.

That the Pacific Cold Storage Company is a corporation organized under the laws of the State of Washington with its principal place of business in the City of Tacoma, Pierce County, Washington; that said corporation was organized on or about the 8th of April, 1897, with a capital stock of $150,000; that subsequently the capital stock of said corporation was increased to $500,000 and later increased to $1,000,000, consisting of 10,000 shares of the par value of $100 each; that at the time of the first and second increase of the capital stock of the corporation, a large percentage of the capital stock of said corporation was acquired, held and owned by residents of Glasgow, Scotland, and other places in Great Britain; that more than 90 per cent of the capital stock of said corporation was owned and held by residents of Great Britain long prior to June 1, 1911, and down to the date of the dissolution of the corporation.

II.

That by reason of the fact that such a large percentage of the capital stock of the corporation was held in Great Britain an advisory committee was appointed by the stockholders residing in Great Britain with the consent and approval of the defendant and of all of the stockholders of said corporation residing in the United States; that the creation of said committee was the joint action of all of the stockholders of the corporation; that said advisory committee was appointed at the time of the first increase of the capital stock of the corporation and continued to [70] be appointed and maintained down to the date of the dissolution of the corporation as hereinafter stated; that each appointment of the advisory committee by the stockholders in Great Britain was ratified and approved by the stockholders residing in the United States and that the creation, maintenance and continuance of said advisory committee was the result of the unanimous action of all of the stockholders of the corporation; that all important business affecting the affairs of the corporation and its policies was submitted to the advisory committee for its approval; that said advisory committee, by the consent of each and all of the stockholders of the corporation, was clothed with powers to enable it to control and regulate and dictate the policies of the corporation, subject only to the approval of the board of trustees of the corporation; that it was agreed by each and all of the stockholders of the corporation that such advisory committee should

have the same powers with regard to the control of the management of the affairs of the corporation as a board of trustees or directors would ordinarily possess and exercise; that full and complete statements and reports of all of the important business of the corporation was submitted to such advisory committee for its approval before action was taken thereon and that the officers of the company complied with the requests of such advisory committee in the conduct and management of the affairs of the corporation at all times; that Mr. David Inglis was the secretary of said advisory committee from the date of its creation to the date of the dissolution of the corporation, and that all statements, audits and reports were sent to the advisory board in care of said David Inglis.

III.

That from about the year 1901 until the date of the dissolution of the corporation, on or about the 3d of June, 1919, the defendant, Charles Richardson, was the president and a member [71] of the board of trustees of said corporation and had active charge and management as such president, of the affairs of said corporation, performing the duties prescribed by the by-laws of the corporation; that for several years prior to January 1, 1911, the said defendant, as such president, drew a salary of $1,000 per month; that on or about the 14th day of December, 1910, the defendant communicated with the advisory committee and indicated that he was not satisfied with the salary that he had been draw-

ing as such president and requested some additional compensation; that on the 13th of January, 1911, the said advisory committee in answer to the defendant's letter of December 14, 1910, wrote the defendant as follows:

> "As regards your own remuneration—Since you raised the point a short time ago, the Board have had the matter before them, and it was their intention that they would shortly have made you a proposal that you be allowed by way of increased *a*molument, an annual commission or bonus on the total amount of dividend paid to the shareholders in each year. Such bonus, they propose should be at the rate of 2½% beginning with the current year."
>
> "They trust that you will view these proposals as a favorable settlement."

That the defendant accepted such proposal and agreed to accept by way of additional compensation for his services a sum from the corporation equal to 2½ per cent upon the amount of the annual dividends paid by the corporation to its shareholders; that the arrangements thus made between the advisory board and the defendant was communicated by the defendant to the board of trustees of the corporation and was in all things approved by the trustees of the corporation then in office; that such arrangement for additional compensation in the amount above stated was thereafter with the consent and approval of the board of trustees of the company, continued until January, 1918, covering the intervening years from January

1, 1911, to December 31, 1917, inclusive, and that said additional sum equal to 2½ per cent of the amount of the dividends declared and paid to the shareholders was paid to [72] the defendant on or about the first of January of each year of said period.

IV.

That all dividends declared by the corporation were paid by the corporation to the shareholders in the amounts of the dividends so declared; that no portion of said 2½ per cent was deducted from the dividends declared to the shareholders, that the shareholders received the full amount of the dividends annually declared during said period but that said 2½ per cent additional emolument or compensation to defendant's salary was paid by the corporation and that the amounts so paid were measured by the computation of 2½ per cent upon the annual dividends declared and paid to the shareholders; and that such payment of 2½ per cent was ratified and approved by the action of the board of trustees of the corporation and by the stockholders of said corporation; that the authorization of the payment of said additional compensation of 2½ per cent was authorized by the board of trustees, by the advisory committee and by the stockholders prior to the several dates upon which the same were paid to the defendant as such additional compensation for his services as president of the corporation.

V.

That at the time such arrangement for such addi-

tional compensation of 2½ per cent was made, and continuously thereafter until about the first of June, 1918, the plaintiff Frederick L. Denman was the secretary and auditor of the corporation and that it was his duty as such auditor and secretary to keep the record and account books of the corporation and to make up vouchers explanatory of all disbursements; that from year to year as such additional compensation was paid by the corporation to the defendant, the said plaintiff, Frederick L. Denman, made up such vouchers; that the explanation upon the vouchers for such additional compensation [73] was substantially as follows:

> "Extra on 2½ per cent of *toal* dividend as per order on file."

together with the amount so paid to the defendant; that the order on file referred to in vouchers by the said plaintiff, Frederick L. Denman, was the agreement or order of the said advisory committee; that each year the account books of the corporation were audited and a report of such audit made and in such audits so annually made the 2½ per cent additional compensation was included and explained; that such audits were submitted to the advisory board and to the stockholders represented by the advisory board and were approved by them, and that such audits were submitted to the board of trustees annually and to the stockholders' meetings in the City of Tacoma and were approved by the board of trustees and by the stockholders' and that the checks drawn by the corporation in payment of said additional compensation were signed by the said

plaintiff, Frederick L. Denman; that the payment of such additional compensation was authorized by the board of trustees of the corporation and by the stockholders and subsequently ratified by the board of trustees and by the stockholders and continued from the time the arrangement was put into effect in 1911 down to and including the year 1917 without the objection or protest or criticism of any stockholder or officer and during a considerable portion of the period the said Frederick L. Denman was one of the trustees of the said corporation.

VI.

That about two years prior to the 31st of May, 1918, the defendant *was* submitted to the advisory board a suggestion of liquidating the corporation and at such time suggested that if it were finally decided to liquidate the corporation, defendant thought that he should be paid a commission upon the amount of money realized from the sale of the assets and their conversion [74] into money and further indicated to said advisory board that he considered five per cent upon the amount so realized as a reasonable and just compensation; that the advisory board authorized and approved the payment of said commission of 5 per cent and that said agreement so made between the advisory board and defendant was thereafter ratified and approved by the board of trustees of the corporation and by the stockholders thereof; that at a meeting of the stockholders of the corporation held on the 31st of May, 1918, the following resolution was unanimously adopted:

"WHEREAS, it is desired by the stockholders that the company should be liquidated and all of its assets sold and that a return of the capital be made as speedily as possible.

"THEREFORE BE IT RESOLVED that the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible and wind up its affairs, returning to the shareholders the amount realized therefor."

That said corporation was not, however, dissolved until the 1st of June, 1919, when an order was duly entered in the Superior Court of Pierce County, Washington, dissolving and disincorporating said company. That on or about the 31st of May, 1918, the defendant submitted to the advisory board a proposal to convert the assets of the company into money and to devote his time to the liquidation of the affairs of the corporation for a commission of 5 per cent on the amount returned to the shareholders; that later, and on July 12, 1918, the defendant again submitted a written proposal to the advisory board, in which he stated that he would devote his time to the liquidation of the company for a commission of 5 per cent on the amount returned to the shareholders, his salary to cease on September 30, 1918; that out of this commission he would pay all commissions and attorneys' fees that he found necessary to be paid in winding up the company, excepting amounts paid in connection with the sale of the "Elihu Thompson," a vessel belonging to the corporation, and that he [75]

would retain the services of R. J. Davis and B. A. Moore for as short a time as possible, who should be paid their present salaries by the corporation. He further stated to the advisory board that it was not his intention to engage in any other business until the company's affairs had been wound up and complete returns made to the shareholders; that this would preclude him from earning anything else during such time; that he hoped to liquidate the company within a year but that contingencies might arise that would require his services for a longer period; that while it should be optional with him, he expected to pay out of his commission of 5 per cent any other officers of the corporation who might be of assistance to him in closing its affairs; that on the 18th of August, 1918, the advisory board agreed to said proposal for remuneration as stated in defendant's letter of July 12th and later and on the 21st of August, 1918, said proposal was further accepted by letter from the advisory board; that immediately upon the receipt of said cablegram or wire from the advisory board the proposed arrangement by which the defendant should receive a commission of five per cent upon the amounts returned to the stockholders was submitted to the board of trustees of the corporation and the same was approved by them and accepted by the defendant and the agreement consummated; that later, and on the 7th of January, 1919, the arrangement for the payment of said commission of 5 per cent to the defendant was again brought before the board of trustees at a meeting of such

board held on said date, and a resolution was duly adopted by the unanimous vote of the board of trustees with the exception of the defendant, who did not vote thereon, said resolution being as follows:

> "WHEREAS, it appears from correspondence between Charles Richardson and the Advisory Board of Glasgow, as shown in a letter from Mr. Richardson of July 12, 1918, and cable in reply of August 18, 1918, and letter of confirmation of August 21, 1918, that an agreement as to compensation to Mr. Richardson for his services in winding up the company and disposing of the assets has been reached so far as it affects a large majority of the shares of the company, and [76]
>
> "WHEREAS, it appears that said agreement is fair and just and that such compensation is reasonable,
>
> "THEREFORE BE IT RESOLVED that the offer contained in the letter of Mr. Richardson of July 12, 1918, be, and the same is hereby accepted and the agreement as set forth in the correspondence between Mr. Richardson and the Advisory Board as herein referred to be, and the same is hereby confirmed and ratified and the officers of this company are authorized and directed to pay the compensation therein named and to fully carry out all of the terms of said agreement."

That the proceedings taken at said meeting of the board of trustees of the corporation held on

January 7, 1919, are hereto attached, marked Exhibit "A," and made a part hereof. That the foregoing resolution was offered at said meeting by Mr. Harold Seddon, who moved its adoption, which was seconded by Mr. Charles A. Miller, the owner at that time of 798 shares of the capital stock of the company, being the same Charles A. Miller named in paragraph II of the second and fourth causes of action.

VII.

That prior to September 1, 1918, the defendant sold and disposed of a portion of the assets of the corporation and shortly after the first of September, 1918, the corporation declared a dividend by the way of distribution of the capital assets of the sum of $500,000.00 and the same was paid by the corporation to its stockholders and later and on or before June 1, 1919, the defendant converted other and additional assets of the corporation into money in the sum of $500,000.00 and the same was distributed by way of a dividend in the distribution of the capital assets of the corporation on or about the 3d of June, 1919, and the same was received by the shareholders and a further dividend was declared and paid in the sum of $50,000.00, making a total distribution of the capital assets to the stockholders in the sum of $1,050,000.00; that said agreement for the payment of said commission of 5 per cent was approved by the advisory board and approved by the board of trustees of the corporation prior to [77] its payment and was subsequently ratified by the action of the share-

holders; that the payment of said commission was authorized by the board of trustees; that the large returns to the stockholders was due to the efforts of the defendant in making advantageous sales and disposition of the assets; that if the said defendant had not sold said assets at the time they were sold, the returns to the stockholders would have been less by the sum of several hundred thousand dollars; that the defendant procured the most advantageous and favorable sales of said assets, that the defendant ceased drawing his salary of $1,000.00 per month on the 30th of September, 1918, in accordance with his said agreement; that at the time said agreement was made for the commission of five per cent the defendant did not know and could not know whether his time would be consumed for a period of one year or two or three years; that it might have taken even a longer time than three years had not the defendant been particularly zealous and successful in the prompt sale and disposition of said assets.

That on the 31st day of May, 1919, the following named persons at a meeting of the stockholders of the corporation were elected trustees, to wit: Charles Richardson, Harold Seddon, B. A. Moore, E. J. Walsh, Ralph S. Stacy, H. C. Schweinler, R. J. Davis, who duly qualified by taking the usual oath of office and entered upon the performance of their duties as trustees; that on the first day of June, 1919, said corporation was dissolved by an order of the Superior Court of Pierce County, Washington, as aforesaid; that the above-named persons were duly elected, qualified and acting trus-

tees of said corporation at the time of its dissolution, and thereupon became the trustees of the creditors and stockholders of the corporation with full power and authority to sue and recover the debts and property of the corporation by the name of the trustees of said corporation, with authority to collect and pay the outstanding debts, settle all of the affairs of the corporation and divide [78] among the stockholders the money and other property that remained after the payment of the debts and necessary expenses; that in their capacity as such trustees under the provisions of Section 3707 of Remington's Code of the State of Washington, said trustees became possessed of the money theretofore in the treasury of the corporation and the said trustees distributed the same by way of dividends and return of the capital stock to the shareholders, which distribution was made on or about June 3, 1919. That since said date all of the affairs of the corporation have been managed and controlled by said board of trustees hereinbefore named and not by this defendant except in so far as he was a member of said board of trustees.

VIII.

That the said defendant at no time ever owned or controlled more than 1353 shares of the capital stock of said corporation; that all sums paid to this defendant were authorized previous to such payments by the board of trustees and by the stockholders and were subsequently ratified and approved by the stockholders, and that as to the 798 shares formerly owned by Charles A. Miller, the said Charles A.

Miller voted affirmatively in favor of a resolution of the board of trustees authorizing the payment of the same as a fair and just compensation for the services to be rendered and that the said Frederick L. Denman acquired said 798 shares with full knowledge of the fact that the said Charles A. Miller had affirmatively approved the payment of said commissions to this defendant, and that the said Frederick L. Denman, himself, and as the successor of the stockholders named in amended complaint, likewise ratified and approved the action of the board of trustees in the payment of the 2½ per cent commission hereinbefore referred to. [79]

SECOND AFFIRMATIVE DEFENSE.

For a further and second affirmative defense to the third and fourth causes of action set forth in the seventh amended complaint, defendant alleges:

I.

That the services performed by this defendant in winding up the affairs of the corporation and in selling and disposing of its assets and in the conversion of the same into money and the distribution of the same to the stockholders, were services rendered outside the scope of his official duties as president and trustee of the corporation; that the reasonable and fair value of the services rendered to the corporation by this defendant outside the scope of his official duties as president and trustee was the sum paid by the corporation for such services; that even though there was no express contract between the corporation, its trustees and stockholders for the payment of said services, the

defendant is entitled to the sums paid for the reason that they were reasonably fair and just for the services rendered outside the scope of the official duties of the defendant as provided by the by-laws of the corporation, and that an implied contract was created for such services even though the Court should hold that there was no express contract for the payment of the amount received by the defendant in the winding up of the corporation, the conversion of its property into money and the distribution of the same among the stockholders.

THIRD AFFIRMATIVE DEFENSE.

For a further and third affirmative defense to the seventh amended complaint, defendant alleges:

I.

That by reason of the actions of the said Frederick L. Denman and Charles A. Miller and by reason of the acts and things done and performed by them as set forth in the first affirmative [80] defense, to which reference is hereby made and the same is hereby made a part of this third affirmative defense, the said plaintiff is estopped from claiming a return of said commissions, or any part thereof from this defendant; that as to the $1,436.40 claimed by the plaintiff in the second cause of action, the payments were made in January 1912, 1913, 1914, 1915, 1916, 1917 and 1918; that this action was not commenced until more than three years after January, 1918, to wit, on November 21, 1921, as to the second cause of action, and that the liability of the defendant, if any, accrued more than three years

before the commencement of the second cause of action and is barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE.

For a further and fourth affirmative defense to the seventh amended complaint, this defendant alleges:

I.

That as to the first cause of action, the payments were made in the months of January, 1912, down to and including January, 1918, and that all of the amounts claimed by the plaintiff in the first cause of action accrued, if at all, more than three years prior to the date of the commencement of this action except as to the payments in January, 1917, and 1918, and that the same are barred by the statute of limitations.

FIFTH AFFIRMATIVE DEFENSE.

For a further and fifth affirmative defense to the seventh amended complaint, this defendant alleges:

I.

That at the time of the commencement of this action, the said Charles A. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company; that no claim of the said Charles A. Miller accrued while he was the owner and holder of said 798 shares of stock; that no assignee of the claim [81] of Charles A. Miller so accruing can be maintained in the courts of the United States under Equity Rule 94, or at all, either in law or in equity.

WHEREFORE having fully answered, the defendant prays that he be dismissed hence with his costs and disbursements in this action expended.

KERR, McCORD & IVEY,
Attorneys for Defendant. [82]

Exhibit "A"

Glasgow, Aug. 21, 1918.

Charles Richardson, Esq.
Tacoma, Wash. U. S. A.

Dear Sir:

I have to acknowledge receipt of your letters of the 12th and 16th ult. As you request in the letter a cable reply on the subject of remuneration, I at once cabled you as follows: "Charich, Tacoma: Advisory Board agree proposal for remuneration as stated your letter twelfth July. "Inglis," which I now confirm. The Advisory Board trust that the arrangement will work out to mutual satisfaction. Your letter of 16th ult. was only received by me on the 17th curt.

Yours faithfully,
DAVID INGLIS.

After a general discussion Mr. Harold Seddon offered the following resolution and moved its adoption, which was seconded by Mr. Miller, viz:

"RESOLUTION.

WHEREAS, It appears from correspondence between Mr. Charles Richardson and the Advisory Board at Glasgow, as shown in a letter from Mr. Richardson of July 12, 1918, and cable in reply

of August 18, 1918, and letter of confirmation of August 21, 1918, that an agreement as to compensation to Mr. Richardson for his services in winding up the Company and disposing of the asssets has been reached so far as it effects a large majority of the shares of the Company; and

WHEREAS, It appears that said agreement is fair and just, and that such compensation is reasonable; Therefore,

BE IT RESOLVED, That the offer contained in the letter of Mr. Richardson of July 12, 1918, be and the same is hereby accepted, and the agreement as set forth in the correspondence between Mr. Richardson and the Advisory Board, as herein referred to, be and the same is hereby confirmed and ratified, and the officers of this Company are authorized and directed to pay the compensation therein named, and to fully carry out all of the terms of said agreement.

The question of the adoption of the resolution being put to a vote, Messrs. Stacy, Miller, Davis, Seddon and Moore voted in favor thereof, Mr. Richardson not voting. The Chairman then announced that the said resolution had been adopted.

Mr. Seddon then moved that the thanks of the Trustees be expressed to the officers of the Company for the efficient and able manner in which the affairs of the Company had been managed. This motion was seconded by Mr. Miller and was declared carried by the Chairman.

Mr. Richardson called the attention of the Board of a letter regarding his compensation from Mr.

David Inglis, Secretary of the Advisory Board, dated July 2, 1918. He stated that he had left the matter open so that it might be considered by a full Board. Mr. Richardson stated that Mr. Inglis had been of great assistance to him in dealing with the question of the dissolution of the Company [83] and that his advice had been valuable to the Company. That a great deal more work had been done by him than was usual in the performance of his duties, and hoped the Board would consider favorably Mr. Inglis' suggestion concerning his compensation. After full discussion, Mr. Harold Seddon moved that the Company pay Mr. Inglis the equivalent of two hundred pounds instead of one hundred and fifty pounds, as had been paid him heretofore. That this decision be communicated to Mr. Inglis with the hope that it would be satisfactory; and if not that the Board here hoped the Advisory Board would intimate its desires in the matter, which would have our further careful consideration.

This motion was seconded by Mr. Davis and was adopted by a vote of all the Trustees.

There being no further business, the meeting adjourned.

"RALPH S. STACY,"
Chairman.

"B. A. MOORE,"
Secy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. May 1, 1922. F. M. Harshberger, Clerk. By Alice Huggins, Deputy. [84]

Motion for Order to Make More Definite and Certain and Strike Portions of Answer to Seventh Amended Complaint.

Comes now the plaintiff and moves the Court for an order to strike from the answer of defendant to plaintiff's seventh amended complaint the third affirmative defense commencing on line 30 on page 17 and ending on line 18 of page 18 of said answer, and also the fifth affirmative defense on pages 18 and 19 of said answer, on the ground that said third affirmative defense is on its face sham and frivolous, and said fifth affirmative defense is sham, frivolous, irrelevant and redundant.

Plaintiff further moves the Court for an order requiring the defendant to make said answer more definite and certain in following mentioned particulars, to wit:

Page 7, lines 23, 26 and 27. By stating whether such advisory committee was created and appointed by any writing or resolution of the stockholders or trustees or by-laws of said corporation and if so to set forth the substance or a copy of said writing, resolution or by-laws.

Page 7, lines 23, 26 and 27. By stating whether the creation and appointment of said advisory committee is recorded in the minutes of any meeting of the trustees or stockholders of said corporation

and if so to set forth the substance or a copy of said minutes and the date thereof.

Pages 7 and 8 in general and particularly lines 9 to 12, inclusive, thereof. By stating whether the powers claimed for said advisory committee and the alleged consent of the stockholders thereto are expressed in writing or in the records of any stockholders' or trustees' meetings or by-laws of said corporation and if so to set forth the substance or a copy of said writing, records and by-laws.

Page 9, lines 21 to 31. By stating whether the alleged [85] communication to the Board of Trustees concerning additional compensation of defendant, was made in writing and whether the alleged approval of the trustees appears by the record of any trustees' meeting; also by stating the substance and date of such approval, if any.

Page 10, paragraph IV, lines 12 to 20, and page 11, lines 13 to 24. By stating whether the alleged authorization and approval and ratification by the trustees and stockholders of the payment of said additional compensation to defendant was expressed in writing or appears by the record of any trustees or stockholders' meeting; also by setting forth the substance and date of any such writing or record.

Page 11, lines 7 to 14. By stating particularly whether the reports of audits alleged to have been made to trustees and stockholders were in writing, by whom each such report was made and what mention if any was made in such reports concerning the extra compensation of two and one-half

per cent paid to defendant or claimed by him; also the substance of any matter contained in such reports calling attention to the fact that defendant received or claimed said additional compensation; and whether said approval of the trustees and stockholders was in writing or appears in the minutes of any meeting of said trustees or stockholders and if so to set forth copies thereof.

Page 12, lines 5 and 6. By stating whether such ratification and approval by the board of trustees and stockholders were in writing or shown in the minutes of the meetings of the trustees or stockholders and if so to set forth the substance or copies thereof; and also give the date of said ratification and approval.

Page 13, lines 17 to 20, inclusive. By stating when such [86] proposed arrangement was submitted to the board of trustees and whether same was approved by them in writing and whether such approval is shown by the minutes of the board and the date of such approval, and if in writing or occurring in the minutes of the corporation to set forth copies thereof.

Page 14, paragraph VII. By stating what part of the capital assets distributed to the stockholders of the Pacific Cold Storage Company and on which he collected his said commission of five per cent were funds accumulated by said company prior to its dissolution and when said company was a going concern.

Page 15, first line (unnumbered). By stating whether the alleged ratification by stockholders of

payment of said five per cent commission was in writing and whether such alleged ratification by stockholders appears by the records of any meeting of stockholders of said corporation and if so the substance and date of any such record or writing.

Page 15, line 2. By stating whether the authorization to pay said commission was written or occurs in the minutes and if so to set it forth and give the date.

Page 16, line 16. By stating when such authorizations were given and whether in writing or occurring in the minutes and if so setting forth substance or copies thereof together with dates.

G. P. FISHBURNE and
A. H. DENMAN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. April 11, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [87]

Order on Motion to Make More Definite and Certain and Strike Portions of Answer to Seventh Amended Complaint.

This cause coming on for hearing on the motion of the plaintiff to strike and to make more definite and certain portions of the answer of the defendant to the seventh amended complaint herein and the Court having heard the arguments of counsel,—

WHEREFORE IT IS ORDERED that the motion to strike the third affirmative defense and the fifth affirmative defense be and is hereby de-

nied, to which the plaintiff excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that the defendant make page 7, lines 23, 26 and 27, more definite and certain by stating whether said advisory committee was created by any writing or resolution of the stockholders or trustees or by-laws of said corporation, and if so, the date of said writing, resolution or by-laws and the place where they may be found among the papers and books of the Pacific Cold Storage Company, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that if the creation and appointment of said advisory committee referred to on page 7, lines 23, 26 and 27, is recorded in the minutes of any meeting of trustees or stockholders of said corporation, that defendant give the date thereof and the place where they will be found in the corporation records, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that pages 7 and 8, particularly lines 9 to 12 and 12 to 16, on page 8, inclusive, be made more definite and certain by stating whether the powers claimed for said advisory committee and the consent of the stockholders thereto are expressed in writing or in the records of any stockholders' or trustees' meetings or by-laws of said corporation, and if in writing the defendant be required to furnish plaintiff a copy of same, and if in [88] the records of any stockholders' or trustees' meetings that he be re-

quired to give the date of same and the volume and page of the books wherein they will be found, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 9, lines 21 to 31, inclusive, be made more definite and certain by the defendant stating whether the communication of the board of trustees concerning additional compensation of defendant was made in writing and if so by furnishing plaintiff a copy of same and whether the approval of the trustees appears by the record of any trustees' meeting, and if so by giving the date of such approval and the volume and page in the book or books of the Pacific Cold Storage Company where it may be found, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 10, paragraph 4, lines 12 to 20, and page 11, lines 13 to 24, be made more definite and certain by the defendant stating whether the alleged authorization and approval and ratification by the trustees and stockholders of the payment of said additional compensation to defendant was expressed in writing and if so by furnishing plaintiff with a copy of same, and by stating whether said authorization appears by the record of any trustees' or stockholders' meeting and by giving the dates of same and where they may be found in the books of the Pacific Cold Storage Company by volume and page, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that the defendant make page 11, lines 7 to 14, more definite and certain by stating whether the reports of audits were made to trustees and stockholders are in writing and by whom such report was made and how the two and one-half per cent item paid to defendant was described in said audit and whether the [89] approval of the trustees and stockholders of the two and one-half per cent paid defendant was in writing or appears in the minutes of any meeting of said trustees or stockholders and if in writing by setting forth copy thereof, and if in the minutes of any meeting of the trustees or stockholders by giving the date of same and the volume and page of the books of the Pacific Cold Storage Company in which it occurs, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 12, lines 5 and 6, be made more definite by stating whether the ratification and approval by the board of trustees and stockholders were in writing or shown in the minutes of the meeting of the trustees or stockholders, and if in writing by giving plaintiff a copy of same, and if in the minutes by giving the date of same and place where they will be found in the records of the Pacific Cold Storage Company, and also by giving the date of said ratification and approval, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 13, lines 17 to 20, inclusive, be made more definite by stating when the proposed arrangement was submit-

ted to the board of trustees and whether the same was approved by them in writing and whether such approval is shown in the minutes of the board and the date of such approval, and if in writing by furnishing plaintiff with a copy of same, and if occurring in the minutes of the corporation by giving the date of same and where they will be found in the corporation records and books, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that the motion to make page 14, paragraph 7, more definite and certain as requested in the middle of page 2 of said motion be and is hereby denied, to which the [90] plaintiff excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that the first unnumbered line on page 15 be made more definite by stating whether the alleged ratification by stockholders of payment of said five per cent commission was in writing and whether same appears by the records of any meeting of stockholders of said corporation, and if in writing by giving plaintiff copy of same, and if it appears in the records of said corporation the date and place where same may be found in said records, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 15, line 2, be made more definite and certain by stating whether the authorization to pay said commission was written or occurs in the minutes, and if in writing by furnishing the plaintiff a copy of same,

and if in the minutes by giving the date and place where same may be found in the records of said corporation, to which the defendant excepts and his exceptions are allowed.

IT IS FURTHER ORDERED that page 16, line 16, be made more definite and certain by stating when such authorizations were given, whether in writing or occurring in the minutes, and if in writing by furnishing plaintiff a copy of same, and if in the minutes by giving the dates and where same will be found in the records, to which the defendant excepts and his exceptions are allowed.

Done in open court this 8th day of May, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 9, 1922. F. M. Harshberger, Clerk. By Alice Huggins, Deputy. [91]

Amended Answer to Seventh Amended Complaint.

Comes now the defendant above named and for an amended answer to the seventh amended complaint of the plaintiff admits, denies and alleges as follows, to wit:

Answer the first cause of action:

I.

Referring to the first paragraph of the first cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company

was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the first cause of action, defendant admits that the capital stock of the Pacific Cold Storage Company was $1,000,000, that the same was divided into 10,000 shares of the par value of $100 each; admits that on the date of the dissolution of the corporation said F. L. Denman was the owner of 60 shares of the capital stock of said corporation, but denies each and every other allegation in said [92] paragraph contained.

III.

Answering the third paragraph of the first cause of action, the defendant admits that the corporation, during the period of its existence, from year to year declared dividends; admits that certain funds were available for distribution among the stockholders at the time of the entry of the order of dissolution; defendant specifically denies that any portion of the assets of the Pacific Cold Storage Company was unlawfully appropriated by the defendant and denies each and every other allegation in said paragraph contained.

IV.

Answering the fourth paragraph of the first cause of action, defendant admits that the defendant was a trustee and president of the Pacific Cold Storage Company, denies that the defendant wrongfully or unlawfully misappropriated or converted to his own use any of the funds of the corporation; defendant admits the payment of dividends in 1912 and 1918, and that the total dividends approximated the sum of $720,000; denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the first cause of action, defendant admits that he has refused to pay to the plaintiff the sum of $108.00, but denies each and every other allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the first cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof. [93]

Answering the second cause of action:

I.

Referring to the first paragraph of the second cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dis-

solution of the corporation was made and entered on the 2d of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the second cause of action, defendant admits that Charles A. Miller at the time of the dissolution of said corporation was the owner of 798 shares of the capital stock of said corporation. Defendant denies each and every other allegation in said paragraph contained.

III.

Answering the third paragraph of the second cause of action, this defendant says that he has neither knowledge nor information as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the second cause of action, the defendant admits that the corporation, during the period of its existence, from year to year declared dividends; admits that certain funds were available for distribution among the stockholders at the time of the entry of the order of dissolution; defendant specifically denies that any portion of the [94] assets of the Pacific Cold Storage Company was unlawfully appropriated by the defendant and denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the second cause of action, defendant admits that the defendant was a trustee and president of the Pacific Cold Storage Company; denies that the defendant wrongfully or unlawfully misappropriated or converted to his own use any of the funds of the corporation; defendant admits the payment of dividends in 1912 to 1918, and that the total dividends approximated the sum of $720,000; denies each and every other allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the second cause of action, this defendant admits that he has failed to pay the sum of $1436.40 mentioned in said paragraph, but denies each and every other allegation in said paragraph contained.

VII.

Answering the seventh paragraph of the second cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and part thereof.

Answering the third cause of action.

I.

Answering the first paragraph of the third cause of action, the defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; [95] admits that a formal order of

dissolution of the corporation was made and entered on the 2d day of June, 1919, in the Superior Court of the State of Washington for Pierce County Defendant denies each and every other allgation in said paragraph contained.

II.

Answering the second paragraph of the third cause of action, this defendant admits that the capital stock of the Pacific Cold Storage Company was the sum of $1,000,000 and that the plaintiff, Frederick L. Denman, was the owner of 60 shares of said stock at the time of dissolution, and denies each and every other allegation in said paragraph contained.

III.

Answering the third paragraph of the third cause of action, the defendant denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the third cause of action, this defendant admits that he has not paid the said sum of $315.00 mentioned in said paragraph; denies each and every other allegation in said paragraph contained.

V.

Answering the fifth paragraph of the third cause of action, this defendant says that he has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

Answering the fourth cause of action:

I.

Answering the first paragraph of the fourth cause of [96] action, this defendant admits that on and prior to June 1, 1919, the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with its principal place of business in the City of Tacoma, Pierce County, Washington; admits that a formal order of dissolution of the corporation was made and entered on the 2d of June, 1919, in the Superior Court of the State of Washington for Pierce County. Defendant denies each and every other allegation in said paragraph contained.

II.

Answering the second paragraph of the fourth cause of action, this defendant admits that the capital stock of the Pacific Cold Storage Company at the time of its dissolution was $1,000,000 and that at the time of its dissolution Chas. A. Miller owned 798 shares of said stock. As to the remaining allegations of the paragraph, this defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

III.

Answering the third paragraph of the fourth cause of action, this defendant says that he has neither knowledge nor information sufficient to form a belief as to the truth or falsity of the matters therein stated and therefore denies the same and each and every part thereof.

IV.

Answering the fourth paragraph of the fourth cause of action, this defendant denies the same and each and every part thereof.

V.

Answering the fifth paragraph of the *fifth* cause of action, this defendant admits that he has not paid the sum of $4189.50 mentioned therein; denies each and every other [97] allegation in said paragraph contained.

VI.

Answering the sixth paragraph of the fourth cause of action, defendant says that he has neither knowledge nor information sufficient to form a belief and therefore denies the same and each and every part thereof.

For a further and first affirmative defense to the seventh amended complaint of the plaintiff, this defendant alleges:

I.

That the Pacific Cold Storage Company is a corporation organized under the laws of the State of Washington with its principal place of business in the City of Tacoma, Pierce County, Washington; that said corporation was organized on or about the 8th day of April, 1897, with a capital stock of $150,000; that subsequently the capital stock of said corporation was increased to $500,000 and later increased to $1,000,000 consisting of 10,000 shares of the par value of $100 each; that at the time of the first and second increase of the capital stock of the corporation, a large percentage of the capital

stock of said corporation was acquired, held and owned by resident of Glasgow, Scotland, and other places in Great Britain; that more than 90 per cent of the capital stock of said corporation was owned and held by residents of Great Britain long prior to June 1, 1911, and down to the date of the dissolution of the corporation.

II.

That by reason of the fact that such a large percentage of the capital stock of the corporation was held in Great Britain, an advisory committee was appointed by the stockholders residing in Great Britain with the consent and approval of the defendant and of all of the stockholders of said corporation [98] residing in the United States; that the creation of said committee was the joint action of all of the stockholders of the corporation. This defendant alleges upon information and belief that the advisory committee was created by a written agreement of the stockholders at that time residing in Great Britain and that the stockholders residing in the United States verbally assented thereto and acquiesced therein; that in any event, whether said agreement by the foreign stockholders was in writing, nevertheless, the advisory committee was appointed by the verbal consent of the stockholders residing in Great Britain; that the defendant has no copy of such writing and does not know the date thereof by that said advisory committee was appointed about the time of the first increase of the capital stock of the corporation and

continued to be appointed and maintained down to the date of the dissolution of the corporation as hereinafter stated; that the appointment of the advisory committee for the stockholders in Great Britain was continuously verbally approved by the stockholders in Great Britain and in the United States; that the creation, maintenance and continuance of said advisory committee was the result of the unanimous action of all of the stockholders of the corporation verbally expressed from time to time at the annual meetings of the stockholders in the City of Seattle and at the meeting of the stockholders approximately the same time residing in Great Britain. That no resolution appears upon the minutes of the meetings of the trustees or stockholders of the corporation but that affirmative action was taken at such meetings verbally; that all important business affecting the affairs of the corporation and its operations was submitted to the advisory committee for its approval; that said advisory committee by the consent of each and all of the stockholders of the corporation verbally given was clothed with powers to enable it to control and regulate and dictate the policies of the corporation, subject only to the approval of the board of trustees of the [99] corporation; that such action by the board of trustees of the corporation was taken at the annual meeting of the stockholders and at the first meeting of the board of trustees after each stockholders' meeting but not spread upon the minutes; that it was agreed by each and all of the stockholders of the corporation that such advisory com-

mittee should have the same powers with regard to the control of the management of the affairs of the corporation as a board of trustees or directors would ordinarily possess and exercise; that such action was verbal but was the action of the stockholders individually and the action of the board of trustees; that full and complete statements and reports of all of the important business of the corporation was submitted to such advisory committee for its approval before action was taken thereon and that the officers of the company continuously and uniformly complied with the requests of such advisory committee in the conduct and management of the affairs of the corporation at all times. That Mr. David Inglis was the secretary of said advisory committee from the date of its creation to the date of the dissolution of the corporation, and that all statements, audits and reports were sent to the advisory committee in care of the said David Inglis. That the correspondence between the said David Inglis and the corporation has been submitted to the plaintiff, that is to say, copies of letters from the corporation to Inglis have been submitted to the plaintiff and the original letters from Inglis to the corporation touching such matters have also been submitted to the plaintiff.

III.

That from the year 1901 until the date of the dissolution of the corporation, on or about the 3d day of June, 1919, the defendant, Charles Richardson, was the president and a member [100] of the board of trustees of said corporation and had active

charge and management as such president of the affairs of said corporation performing the duties prescribed by the by-laws of the corporation; that for several years prior to January 1, 1911, the said defendant, as such president, drew a salary of $1,000 per month; that on or about the 14th day of December, 1910, the defendant communicated with the advisory committee and indicated that he was not satisfied with the salary that he had been drawing as such president and requested some additional compensation; that on the 13th day of January, 1911, the said advisory committee in answer to the defendant's letter of December 14, 1910, wrote the defendant as follows:

> "As regard your own remuneration—Since you raised the point a short time ago, the Board have had the matter before them, and it was their intention that they would shortly have made you a proposal that you be allowed by way of increased emolument, and annual commission or bonus on the total amount of dividend paid to the shareholders in each year. Such bonus, they propose should be at the rate of 2½% beginning with the current year."

That the defendant accepted such proposal and agreed to accept by way of additional compensation for his services a sum from the corporation equal to 2½% upon the amount of the annual dividends paid by the corporation to its shareholders; that the arrangement thus made between the advisory committee and the defendant was communicated by the defendant to the board of trustees of the cor-

poration and was in all things approved by the trustees of the corporation annually at the various meetings of the board of trustees and particularly at the first meeting after the annual stockholders' meeting; that no record of the resolution approving such arrangement was placed upon the minutes but that the resolution was adopted by the unanimous vote of the trustees at such meetings verbally; that such arrangement for additional compensation in the amount above stated was thereafter with the consent and approval of the board of trustees of the company, continued until January, 1918, [101] covering the intervening years from January 1, 1911, to December 31, 1917, inclusive, and that said additional sum was equal to 2½ per cent of the amount of the dividends declared and paid to the stockholders and was paid to the defendant on or before the first of January of each year of said period, and at the meeting of the board of trustees held about the time the payment was made, the matter was brought before the board and continuously adopted by verbal action of the board but no record was made thereof upon the minutes.

IV.

That all dividends declared by the corporation were paid by the corporation to the shareholders in the amounts of the dividends so declared; that no portion of said 2½ per cent was deducted from the dividends declared to the shareholders, that the shareholders received the full amount of the dividends annually declared during said period but that said 2½ per cent additional emolument or compen-

sation to defendant's salary was paid by the corporation and that the amounts so paid were measured by the computation of 2½ per cent upon the annual dividends declared and paid to the shareholders; and that such payment of 2½ per cent was *a*rtified and approved by the action of the board of trustees of the corporation and by the stockholders of said corporation; that the authorization of the payment of said additional compensation of 2½ per cent was authorized by the board of trustees, by the advisory committee and by the stockholders prior to the several dates upon which the same were paid to the defendant as such additional compensation for his services as president of the corporation; that the arrangement for the additional compensation hereinbefore set forth and the action taken by the board of [102] trustees thereon as stated in the preceding paragraphs is hereby referred to and made a part of this paragraph.

V.

That at the time such arrangement for such additional compensation of 2½ per cent was made, and continuously thereafter until about the first of June, 1918, the plaintiff Frederick L. Denman was the secretary and auditor of the corporation and that it was his duty as such auditor and secretary to keep the record and account-books of the corporation and to make up vouchers explanatory of all disbursements; that from year to year as such additional compensation was paid by the corporation to the defendant, the said plaintiff, Frederick

L. Denman, made up such vouchers; that the explanation upon the vouchers for such additional compensation was substantially as follows:

> "Extra on 2½ per cent of total dividend as per order on file."

together with the amount so paid to the defendant; that the order on file referred to in vouchers by the said plaintiff, Frederick L. Denman, was the agreement or order of the said advisory committee; that each year the account-books of the corporation were audited and a report of such audit made and in such audits so annually made the 2½ per cent additional compensation was included and explained; that such audits were submitted to the advisory board and to the stockholders represented by the advisory board and were approved by them and that such audits were submitted to the board of trustees annually and to the stockholders' meetings in the City of Tacoma, and were approved by the board of trustees and by the stockholders, and that the checks drawn by the corporation in payment of said additional compensation were signed by the said plaintiff, Frederick L. Denman; that the payment of such additional compensation was authorized by the board of trustees of the corporation and by the stockholders in subsequently ratified by the board [103] of trustees and by the stockholders and continued from the time the arrangement was put into effect in 1911 down to and including the year 1917 without the objection or protest or criticism of any stockholder or officer and during a considerable portion of the period the said Fred-

erick L. Denman was one of the trustees of the said corporation. That the audits referred to in this paragraph were in writing and were prepared usually by Eli Moorehouse & Co. chartered accountants and that such reports were then submitted to the plaintiff. That on January 13, 1912, the defendant wrote the following to Frederick L. Denman:

"Tacoma, Wash., Jan. 13th, 1912.

"F. L. Denman, Auditor,
Pacific Cold Storage Company,
Tacoma, Wash.

Dear Sir:

By virtue of a resolution passed by Advisory Board at its Annual Meeting in January, 1911, I was voted two and one-half (2½) per cent as a bonus on all Dividends declared, in addition to my salary.

You will therefore issue me a check for two and one-half per cent of the Dividend in addition to my regular dividend.

Yours truly,
CHARLES RICHARDSON,
President."

That remittance statement No. 19982 contained a check in favor of Charles Richardson for $2500, which was entered in the Pacific Cold Storage Company's Audited Voucher Record, at page 23, under date of Jan. 13th, 1912, and was charged to Office Expenses. In like manner and in similar vouchers defendant was paid $2500 in 1913; $2500.00 in 1914, $1500 in 1915, $2000 in 1916, $2000 in 1917 and $5000 in 1918. These payments are all shown on the books of the company and are included in

the annual reports prepared by its auditor who was at that time the plaintiff, and by chartered accountants. On page 232 of the Record of Trustees' meetings, dated January 7, 1913, the following resolution was made: [104]

> "Upon motion of Mr. Davis, seconded by Mr. Denman (plaintiff), it was unanimously carried that the Report of the President covering the year ending September 30, 1912, together with the statement of assets and liabilities and profit and loss account for the same period, be approved and adopted."

The payment of $2500 in 1912 was a part of the profit and loss account. Again on page 243 under date of January 15, 1914, the following record was made:

> "Reports of the officers for the year ending September 30, 1913 were approved, accepted and placed on file."

These reports included the annual statement of accounts, including the payment to Mr. Richardson of $2500 in 1913. As to the years 1914 and 1915, no formal action was recorded but the action was taken as hereinbefore stated. On May 31, 1917, the following record appears:

> "Moved, seconded and unanimously carried that the accounts as presented by the chartered auditors, Moorehouse & Co., be approved, and the Acts of the Board of Trustees were also approved."

This refers to the accounts of 1916 including the $2000 paid Mr. Richardson that year. At the an-

nual meeting of the stockholders on May 31, 1918, the following resolution was adopted:

> "Resolved.That the annual accounts as audited by Eli Moorhouse & Company, Chartered Accountants, for the year ending September 30th, 1917, now on file, be and the same are confirmed and approved."

These annual accounts included $2000 paid Mr. Richardson in 1917. But at all of the meetings of the trustees declaring dividends the arrangement as to the 2½ per cent additional compensation was unanimously approved, although not spread upon the minutes in all cases.

VI.

That about two years prior to the 31st day of May, 1918, the defendant submitted to the advisory board a suggestion of liquidating the corporation and at such time suggested that if it were finally decided to liquidate the corporation, defendant [105] thought that he should be paid a commission upon the amount of money realized from the sale of the assets and their conversion into money and further indicated to said advisory board that he considered five per cent upon the amount so realized as a reasonable and just compensation; that the advisory board authorized and approved the payment of said commission of 5 per cent and that said agreement so made between the advisory board and defendant was thereafter ratified and approved by the board of trustees of the corporation and by the stockholders thereof; that the approval herein referred to is set forth in the exhibit attached to

the answer. That at the meeting of the stockholders of the corporation held on the 31st day of May, 1918, the following resolution was unanimously adopted:

> "WHEREAS, it is desired by the stockholders that the company should be liquidated and all of its assets sold and that a return of the capital be made as speedily as possible,
>
> "THEREFORE BE IT RESOLVED that the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible and wind upon its affairs returning to the shareholders the amount therefore."

That said corporation was not, however, dissolved until the 1st of June, 1919, when an order was duly entered in the Superior Court of Pierce County, Washington, dissolving and disincorporating said company. That on or about the 31st day of May, 1918, the defendant submitted to the advisory board a proposal to convert the assets of the company into money and to devote his time to the liquidation of the corporation for a commission of 5 per cent on the amounts returned to the shareholders, his salary to cease on Sept. 30, 1918; that out of this commission he would pay all commissions and attorneys' fees that he found necessary to be paid in winding up the company, excepting amounts paid in connection with the sale of the "Elihu Thompson" a vessel belonging to the corporation, and that he would retain the services of R. F. Davis and B. A. Moore for as short a time as possible, who should be paid their present salaries [106] by the corpora-

tion. He further stated to the advisory board that it was not his intention to engage in any other business until the company's affairs had been wound up and complete returns made to the shareholders; that this would preclude him from earning anything else during such time; that he hoped to liquidate the company within a year but that contingencies might arise that would require his services for a longer period; that while it should be optional with him, he expected to pay out of his commission of 5 per cent, any other officers of the corporation who might be of assistance to him in closing its affairs; that on the 18th of August, 1918, the advisory board agreed to said proposal for remuneration as stated in defendant's letter of July 12, and later and on the 21st of August, 1918, said proposal was further accepted by letter from the advisory board; that immediately upon the receipt of said cablegram or wire from the advisory board the proposed arrangement by which the defendant should receive a commission of five per cent upon the amounts returned to the shareholders was submitted to the board of trustees of the corporation and the same was approved by them and accepted by the defendant and the agreement consummated; that later, and on the 7th of January, 1919, the arrangement for the payment of said commission of five per cent to the defendant was again brought before the board of trustees at a meeting of such board held on said date, and a resolution was duly adopted by the unanimous vote of the board of trustees with the

exception of the defendant, who did not vote thereon said resolution being as follows:

"WHEREAS it appears from correspondence between Charles Richardson and the Advisory Board of Glasgow, as shown in a letter from Mr. Richardson of July 12, 1918, and cable in reply of August 18, 1918, and letter of confirmation of August 21, 1918, that an agreement as to compensation to Mr. Richardson for his services in winding up the company and disposing of the assets has been reached so far as it affects a large majority of the shares of the company, and [107]

"WHEREAS, it appears that said agreement is fair and just and that such compensation is reasonable,

"THEREFORE BE IT RESOLVED that the offer contained in the letter of Mr. Richardson of July 12, 1918, be, and the same is hereby accepted and the agreement as set forth in the correspondence between Mr. Richardson and the advisory board as herein referred to be, and the same is hereby confirmed and ratified and the officers of this company are authorized and directed to pay the compensation therein named and to fully carry out all of the terms of said agreement."

That the resolutions referred to are set forth in Exhibit "A" attached to the answer. That the proceedings taken at said meeting of the Board of Trustees are all found in Exhibit "A" attached to the answer. The *the* foregoing resolution was of-

fered at said meeting by Mr. Harold Seddon, who moved its adoption, which was seconded by Mr. Charles A. Miller, the owner at the time of 798 shares of the capital stock of the company, being the same Charles Miller named in paragraph II of the second and fourth causes of action.

VII.

That prior to September 1, 1918, the defendant sold and disposed of a portion of the assets of the corporation and shortly after the first of September, 1918, the corporation declared a dividend by way of a distribution of the capital assets of the sum of $500,000.00 and the same was paid by the corporation to its stockholders and later, and on or before June 1, 1919, the defendant converted other and additional assets of the corporation into money in the sum of $500,000.00 and the same was distributed by way of a dividend in the distribution of the capital assets of the corporation on or about the 2d day of June, 1919, and the same was received by the shareholders and a further dividend was declared and paid in the sum of $50,000, making a total distribution of the capital assets to the stockholders in the sum of $1,050,000.00; that said agreement for the payment of said commission of five per cent was approved by the advisory board and approved by the board of trustees of the corporation prior to its payment and was subsequently ratified by the [108] action of the shareholders; that the payment of said commissions was authorized by the board of trustees; that the large returns to the stockholders was due to the efforts of the defendant

in making advantageous sales and disposition of the assets; that if the said defendant had not sold said assets at the time they were sold, the returns to the stockholders would have been less by the sum of several hundred thousand dollars; that the defendant procured the most advantageous and favorable sales of said assets; that the defendant ceased drawing his salary of $1000.00 per month on the 30th of September, 1918, in accordance with his said agreement; that at the time said agreement was made for the commission of five per cent the defendant did not know and could not know whether his time would be consumed for a period of one year or two or three years; that it might have taken even a longer time than three years had not the defendant been particularly zealous and successful in the prompt sale and disposition of said assets; that the ratification referred to is shown by Exhibit "A" and by the proceedings of the board of trustees held on January 7, 1919.

That on the 31st of May, 1919, the following named persons at a meeting of the stockholders of the corporation were elected trustees, to wit: Charles Richardson, Harold Seddon, B. A. Moore, E. J. Walsh, Ralph S. Stacey, H. C. Schweinler and R. J. Davis, who duly qualified by taking the usual oath of office and entered upon the performance of their duties as trustees; that on the first day of June, 1919, said corporation was dissolved by an order of the Superior Court of Pierce County, Washington, as aforesaid; that the above-named persons were duly elected, qualified and acting

trustees of said corporation at the time of its dissolution and thereupon became the trustees of the creditors and stockholders of the corporation with full power and authority to sue and recover the debts and property of the corporation by the name of the trustees [109] of said corporation with authority to collect and pay the outstanding debts, settle all of the affairs of the corporation and divide among the stockholders the money and other property that remained after the payment of the debts and necessary expenses; that in their capacity as such trustees under the provisions of Section 3707 of Remington's Code of the State of Washington, said trustees became possessed of the money theretofore in the treasury of the corporation and the said trustees distributed the same by way of dividends and return of the capital stock to the shareholders, which distribution was made on or about June 3, 1919. That since said date all of the affairs of the corporation have been managed and controlled by said board of trustees hereinbefore named and not by this defendant except insofar as he was a member of said board of trustees.

VIII.

That the said defendant at no time ever owned or controlled more than 1353 shares of the capital stock of said corporation; that all sums paid to this defendant were authorized previous to such payments by the board of trustees and by the stockholders and were subsequently ratified and approved by the stockholders, and that as to the 798 shares formerly owned by Charles A. Miller, the

said Charles A. Miller voted affirmatively in favor of a resolution of the board of trustees authorizing the payment of the same as a fair and just compensation for the services to be rendered and that the said Frederick L. Denman acquired said 798 shares with full knowledge of the fact that the said Charles A. Miller had affirmatively approved the payment of said commissions to this defendant and that the said Frederick L. Denman, himself, and as the successor of the stockholders named in the amended complaint, likewise ratified and approved the action of the board of trustees in the payment of the 2½ per cent commissions hereinbefore referred to. The authorization referred to is shown by [110] the minutes of the meeting of Jan. 7, 1919, heretofore referred to and the authorization was also approved by the board of trustees at meetings at which the trustees were present, held during the summer of 1918 and in the fall of 1918.

SECOND AFFIRMATIVE DEFENSE.

For a further and second affirmative defense to the third and fourth causes of action set forth in the seventh amended complaint, defendant alleges:

I.

That the services performed by this defendant in winding up the affairs of the corporation and in selling and disposing of the assets and in the conversion of the same into money and the distribution of the same to the stockholders were services rendered outside the scope of his official duties as president and trustee of the corporation; that the reasonable and fair value of the services rendered

to the corporation by this defendant outside the scope of his official duties as president and trustee was the sum paid by the corporation for such services; that even though there was no express contract between the corporation, its trustees and stockholders for the payment of said services, the defendant is entitled to the sums paid for the reason that they were reasonably fair and just for the services rendered outside the scope of the official duties of the defendant as provided by the by-laws of the corporation, and that and implied contract was created for such services even though the Court should hold that there was no express contract for the payment of the amount received by the defendant in the winding up of the corporation, the conversion of its property into money and the distribution of the same among the stockholders. [111]

THIRD AFFIRMATIVE DEFENSE.

For a further and third affirmative defense to the seventh amended complaint, defendant alleges:

I.

That *be* reason of the actions of the said Frederick L. Denman and Charles A. Miller and by reason of the acts and things done and performed by them as set forth in the first affirmative defense, to which reference is hereby made and the same is hereby made a part of this third affirmative defense, the said plaintiff is estopped from claiming a return of said commissions, or any part thereof from this defendant; that as to the $1436.40 claimed by the plaintiff in the second cause of action, the payments

were made in January, 1912, 1913, 1914, 1915, 1916, 1917 and 1918; that this action was not commenced until more than three years after January, 1918, to wit, on November 21, 1921, as to the second cause of action and that the liability of the defendant, if any, accrued more than three years before the commencement of the second cause of action and is barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE.

For a further and fourth affirmative defense to the seventh amended complaint, this defendant alleges:

I.

That as to the first cause of action, the payments were made in the months of January, 1912, down to and including January, 1918, and that all of the amounts claimed by the plaintiff in the first cause of action accrued, if at all, more than three years prior to the date of the commencement of this action except as to the payments in January 1917 and 1918, and that the same are barred by the statute of limitations. [112]

FIFTH AFFIRMATIVE DEFENSE.

For a further and fifth affirmative defense to the seventh amended complaint, this defendant alleges:

I.

That at the time of the commencement of this action, the said Charles A. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company; that no claim of the said Charles A. Miller accrued while he was the owner

and holder of said 798 shares of stock; that no assignee of the claim of Charles A. Miller so accruing can be maintained in the courts of the United States under Equity Rule 94, or at all, either in law or in equity,

WHEREFORE, having fully answered, the defendant prays that he be dismissed hence with his costs and disbursements in this action expended.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 31, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [113]

Reply to Amended Answer to Seventh Amended Complaint.

Plaintiff for reply to the amended answer of the defendant to plaintiff's seventh amended complaint:

I.

Denies each and every allegation in the first, second, third, fourth and fifth affirmative defenses of said amended answer, except such matters hereinafter expressly set forth, alleged or admitted.

II.

Plaintiff admits the allegations of paragraph "I" of the first affirmative defense contained in lines 4 to 19 of said amended answer save and except that plaintiff denies that more than seventy per cent of

the capital stock of said corporation was owned or held by residents of Great Britain.

III.

Plaintiff denies each and every allegation of paragraph "II" of said amended answer commencing with line 20 on page 7 and ending with line 21 on page 9 thereof; save and except that plaintiff admits as defendant confesses, that defendant does not know of any writing defining the purposes or powers of said pretended advisory board; and also as confessed by defendant, that no express sanction for the powers alleged to have been exercised by said advisory board exists in the records of said corporation or by contract in writing.

IV.

Plaintiff admits the allegations of paragraph "III" of said first affirmative defense commencing with line 22 and ending with line 29 on page 9 concerning defendant's salary and relations to the Pacific Cold Storage Company. [114]

Plaintiff has no knowledge or information sufficient to form a belief as to negotiations alleged to have been conducted by defendant with David Inglis and said advisory committee pursuant to design or scheme of defendant to obtain compensation, therefore denies each and every allegation concerning such negotiations contained in paragraph "III" of said affirmative defense commencing on line 30 of page 9 and ending with line 13 of page 10.

Plaintiff denies each and every other allegation of paragraph "III" of said affirmative defense commencing with line 14 on page 10 and ending with

line 2 on page 11; save and except, however, that plaintiff admits, as confessed by defendant, that said pretended negotiations conducted between Inglis and Richardson do not now and never had the sanction of any contract in writing or record on the part of the Pacific Cold Storage Company, its trustees or stockholders.

V.

Plaintiff admits the allegations commencing with line 3 and ending with line 12 on page 11 of said amended answer except that plaintiff denies that said two and one-half per cent taken by the defendant was paid, sanctioned or authorized by the corporation; plaintiff denies each and every other allegation in the remaining lines of said paragraph commencing with line 13 and ending with line 24 on page 11.

VI.

Plaintiff denies each and every allegation contained in lines 25 to 31 on page 11 of said amended answer except that plaintiff admits that at the times mentioned he was secretary of said corporation and that he kept its records, its books and accounts, plaintiff being the treasurer as well as the secretary and not the auditor of said corporation. [115]

VII.

Plaintiff denies each and every allegation contained in lines 1 to 27 on page 12 of said answer save and except that plaintiff admits that until May 31, 1918, he was one of the trustees of the Pacific Cold Storage Company; plaintiff further admits that the vouchers on file for payment of said two

and one-half per cent additional compensation contained and quoted, among others, the words: "as per order on file."

Plaintiff denies that there was any order on file except the command in writing by defendant himself addressed to plaintiff and set forth by copy on lines 3 to 11 on page 13 in defendant's answer, whereby defendant ordered payment to himself; and that such and no other constituted the order referred to in said vouchers. Plaintiff denies that defendant ever produced or made a matter of record or filed with said corporation or communicated to its trustees or stockholders any correspondence, writing agreement or record with any stockholder or group of stockholders authorizing him to have additional compensation of two and one-half per cent; and plaintiff further denies that the subject of such additional allowance was ever reported to said trustees or proposed to them by said defendant or that such additional compensation was ever discussed in any meeting of trustees or stockholders of said corporation.

VIII.

Plaintiff admits the allegations contained in lines 28 to 31 on page 12 of said amended answer to the effect that accounts of said corporation were audited by Eli Morehouse or Eli Morehouse & Co., but denies that said reports were submitted to plaintiff or delivered to him for any purpose other than filing. [116]

IX.

Plaintiff admits the allegations of lines 1 to 11 on page 13 of said amended answer containing copy

of the letter whereby defendant ordered plaintiff to make vouchers or check for said additional two and one-half per cent payable to defendant himself.

X.

Plaintiff admits the allegations commencing with line 12 on page 13 and ending with line 11 on page 14 of said amended answer as to vouchers and checks to defendant and resolutions of trustees approving accounts except that plaintiff denies (page 13, lines 18 to 20) that he was auditor or prepared any annual reports or that the reports prepared by chartered accountants contained any reference to the fact that defendant was taking two and one-half per cent in addition to his salary.

XI.

Plaintiff denies each and every allegation commencing with line 13 and ending with line 17 on page 14, and particularly denies that at any meeting of trustees there was any mention or approval, either oral or written, as to whether defendant was claiming two and one-half per cent in addition to his salary or to the effect that he was taking such additional amount.

XII.

Plaintiff alleges that he has no knowledge or information sufficient to form a belief as to the allegations commencing on line 18 and ending with line 29 of page 14 of said answer as to when defendant began to plan or scheme to secure for himself a part of the funds to be paid to stockholders on dissolution of the corporation and therefore denies

each and [117] every allegation in said lines 18 to 29.

XIII.

Plaintiff denies the allegations of lines 29 to 31 on page 14 of said amended answer and particularly denies that the stockholders of said corporation or any committee of stockholders ever ratified or approved payment to defendant of five per cent of the capital return of said corporation and denies that the board of trustees of said corporation in advance of its dissolution gave any sanction, written or verbal, as to disposition of stockholders' funds or had at any time any authority from stockholders or any right or sanction in law or fact to do so.

XIV.

Plaintiff admits the allegations commencing with line 2 and ending with line 7 on page 15 of said amended answer to the effect that the stockholders voted on May 31, 1918, to dissolve the corporation; plaintiff further admits the allegations of lines 9, 10, and 11 on page 15 to the effect that decree was entered dissolving said corporation on June 1, 1919. Plaintiff denies that said corporation was not dissolved until June 1, 1919.

XV.

Plaintiff alleges that he has neither knowledge or information sufficient to form a belief as to the allegations commencing with line 11 on page 15 and ending with line 13 on page 16 of said amended answer as to negotiations or schemes of defendant to secure five per cent of the amounts to be returned to shareholders and therefore denies each and every

allegation commencing with line 11 on page 15 and ending with line 13 on page 16. Plaintiff particularly denies that any such negotiations for five per cent commission were ever disclosed to the trustees for the said corporation or the [118] trustees of its stockholders prior to January 7, 1919.

XVI.

Plaintiff further denies the allegations commencing with line 14 on page 16 and ending with line 6 on page 7 of said amended answer to the effect that the resolution purporting to grant defendant five per cent of returns to stockholders was adopted by the Board of Trustees on January 7, 1919, in any manner except as hereinafter stated, and further denies that said resolution was seconded by Charles A. Miller or that any consent apparently given by said Miller was more than a recognition of what he believed could not be prevented.

XVII.

Plaintiff denies each and every allegation commencing with line 8 and ending with line 31 on page 17 of said amended answer, except that plaintiff admits that prior to September 1, 1918, a portion of the assets of the corporation were liquidated and converted into cash, and that in September, 1918, $500,000 of the capital return was distributed to the stockholders of said company, and that on or before June 1st, 1919, an additional $500,000 of the capital return was distributed and paid to the stockholders of said company, and on or about the 2d day of June, 1919, an additional $50,000 of the capital return was made and paid to the stockholders of said

company, making a total of said capital return received by said stockholders in the sum of $1,050.000.

XVIII.

Plaintiff admits that by resolution of the board of trustees defendant's right to a salary ceased on September 30, 1918; defendant denies each and every other allegation commencing with line 1 and ending with line 10 on page 18 of said amended answer; plaintiff denies in particular that the resolution [119] stopping defendant's salary was in pursuance of an agreement or formed part of any agreement whereby he was to receive any other compensation whatsoever.

XIX.

Plaintiff admits the allegations commencing with line 10 page 18 and ending with line 15, page 18, and admits that on the 1st of June, 1919, an order of the Superior Court of Pierce County, Washington was entered declaring said corporation dissolved, and admits that such trustees were acting as such at the time of the dissolution of said corporation, and denies each and every other allegation commencing with line 16, on page 18 and ending with line 5 on page 19 at the end of paragraph VII.

XX.

Plaintiff denies each and every allegation of paragraph "VIII" commencing with line 6 and ending with line 27 on page 19 of said amended answer.

XXI.

Plaintiff denies each and every allegation contained in said amended answer as a second affirmative defense and found on page 20 thereof.

XXII.

Replying to the matter stated as defendant's third affirmative defense commencing with line 30 on page 20 and ending with line 13 on page 21 of said amended answer, plaintiff admits that the amounts in the total sum of $1436.40 were taken by defendant in the years as set forth; plaintiff denies each and every other allegation set forth as said third affirmative defense.

XXIII.

Replying to the matter set forth in defendant's fourth affirmative defense commencing with line 18 and ending with [120] line 24 on page 21 of said amended answer, plaintiff admits that the amounts were taken by defendant at times as stated; further plaintiff denies each and every other allegation set forth as said fourth affirmative defense.

XXIV.

Replying to the matter set forth as defendant's fifth affirmative defense commencing with line 29 on page 21 and ending with line 5 on page 22 of said amended answer plaintiff admits that at the time of the commencement of this action, Charles E. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company; further plaintiff denies each and every other allegation set forth by defendant as said fifth affirmative defense.

FOR A FURTHER AND AFFIRMATIVE REPLY TO SAID AMENDED ANSWER, plaintiff alleges:

That if the said Charles A. Miller gave his formal assent to said resolution of January 7th, 1919, on

that date, it was due and owing to the fact that defendant sprung said resolution upon said Charles A. Miller and the other trustees as a surprise and defendant's stating that said resolution had the support of a large body of the stockholders, which it had not, and defendant, fraudulently then and there acting wholly in his own interests, took advantage of his trust and superior knowledge and position gained by means of his trust, to conceal all material facts relating to his pretended services and to deprive said trustees, and said Charles A. Miller in particular, of any knowledge or opportunity to protect his interests against the advantage defendant took.

G. P. FISHBURNE and
A. H. DENMAN,
Attorneys for the Plaintiff.

#1518–20 Puget Sound Bank Building, Tacoma, Washington. [121]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [122]

Stipulation Re Letters, etc., to be Used in Evidence.

IT IS STIPULATED by and between the attorneys for the plaintiff and the attorneys for the defendant that copies of all letters, statements, reports and communications sent by the Pacific Cold Storage Company and by Charles Richardson, or either

of them, to David Inglis at Glasgow, Scotland, and to the advisory committee or the said David Inglis to the Pacific Cold Storage Company or to the defendant Charles Richardson, may be introduced in evidence in this case by either party to this action without objection on the part of the other party except as to their relevancy, competency or materiality.

Dated this 25th day of October, 1922.

A. H. DENMAN,
G. P. FISHBURNE,
Attorneys for Plaintiff.
KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Oct. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [123]

Verdict.

We, the jury empanelled in the above-entitled cause, find for the defendant.

W. P. BONNEY,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 9, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [124]

Judgment.

This cause came on for hearing on the 8th day of *November, 1923,* and a verdict by the jury was rendered against the plaintiff and for the defendant on the 9th day of November, 1922.

WHEREFORE IT IS ORDERED that the above entitled action be and is hereby dismissed and that the defendant have judgment against the plaintiff for his costs taxed at $230.19.

Done in open court this 19th day of December, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Dec. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [125]

Motion for New Trial.

Comes now the plaintiff in the above-entitled action and moves for a new trial herein on the following grounds:

1. Irregularity in the proceedings of the Court, jury and adverse party and the order of the Court taking from the consideration of the jury the claims of the plaintiff for the two and one-half per cent commission prior to the year 1917 set forth in the first and second causes of action, and the order of the Court taking from the consideration

of the jury the fourth cause of action, and the abuse of discretion by the Court by which the plaintiff was prevented from having a fair trial.

2. Misconduct of the prevailing party.

3. Insufficiency of the evidence to justify the verdict and decision and that it is against the law and evidence adduced at the trial.

4. Error in law appearing at the trial and excepted to at the time by the party making the application.

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [126]

Stipulation Extending Time Sixty Days from November 10, 1922, for Perfecting Appeal.

IT IS HEREBY STIPULATED AND AGREED that the time for the making, service and filing of the statement of facts and bill of exceptions in the above-entitled action may be extended and enlarged until sixty days from the 10th day of November, 1922, or if the motion for new trial now pending in the above-entitled action is not disposed of until after said sixty days that the time for the making, filing and serving of the bill of exceptions or statement of facts may be extended

and enlarged until ten days after the date of disposition of said motion for new trial.

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff.
KERR, McCORD & IVEY,
By W. B. McCORD,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [127]

Order Extending Time Sixty Days from November 10, 1922, for Perfecting Appeal.

The Court having considered the stipulation of counsel herein,—

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the time for the making, filing and serving of the bill of exceptions or statement of facts in the above-entitled action be and is hereby extended and enlarged until sixty days from the 10th day of November, 1922, or if the motion for trial herein is not disposed of until after said sixty days the time for the making, serving and filing of said bill of exceptions or statement be and is hereby extended and enlarged until ten days after the disposition of said motion for new trial.

Done in open court this 10th day of November, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 10, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [128]

Order Overruling Motion for New Trial.

The Court having heard the argument of counsel on the motion for new trial herein and having duly considered the same,

WHEREFORE, IT IS ORDERED that said motion for new trial be and is hereby overruled, to which the plaintiff excepts and his exceptions are allowed.

Done in open court this 27th day of November, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Nov. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [129]

Stipulation Extending Return Day for Filing Record and Docketing Cause to March 15, 1923.

IT IS HEREBY STIPULATED AND AGREED that the return day for the writ of error and citation herein and the time for settling the bill of

exceptions and for the filing of the record and docketing of the above-entitled action in the United States Circuit Court of Appeals may be extended and enlarged up to and including the 15th day of March, 1923.

G. P. FISHBURNE,
Attorney for Plaintiff.
KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 3, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [130]

Order Extending Time to and Including March 15, 1923, to File Record and Docket Cause.

The Court having considered the stipulation herein,—

WHEREFORE IT IS ORDERED that the time for the return day of the writ of error and the citation and for settling the bill of exceptions and for filing the record and docketing in the above-entitled action with the Clerk of the United States Circuit Court of Appeals be and hereby is extended and enlarged to and including the 15th day of March, 1923.

Done in open court this 8th day of January, 1923.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [131]

Bill of Exceptions and Statement of Facts.

BE IT REMEMBERED that heretofore and on the 8th day of November, 1922, the above-entitled cause coming regularly on for trial before the Honorable JEREMIAH NETERER, one of the Judges of the above-entitled court, and a jury duly called, examined and sworn to try the cause; and

The plaintiff being present in person and represented by his attorneys G. P. Fishburne, Esq., and A. H. Denman, Esq., and

The defendant being present in person and represented by his attorneys Kerr, McCord & Ivey (By Mr. McCord), and

Counsel for the respective parties having stated to the jury the facts which they expected to prove in the trial hereof, the following proceedings were had and done in the trial of this cause, to wit: [132]

Testimony of Frederick L. Denman, in His Own Behalf.

FREDERICK L. DENMAN, the plaintiff, being duly sworn, testified as follows:

Mr. Denman identified the office cash-book as identification 2, Tacoma journal file as identification 3, Tacoma office audited voucher register as identi-

(Testimony of Frederick L. Denman.)
fication 4, Gleachen sales record as identification 5, Gleachen general ledger as identification 6, reports of cash receipts and disbursements Gleachen office as identification 7, Tacoma vouchers as identification 8, Tacoma general ledger as identification 9, Gleachen record of sales as identification 10, original certificate of stock of the company as identification 11, and Gleachen transfer ledger as identification 12, and said identifications were so marked by the clerk and admitted in evidence as exhibits 2 to 12 inclusive (See Transcript, pp. 12 and 13).

The book containing the by-laws and minutes of the Pacific Cold Storage Company from its inception to dissolution was offered and admitted in evidence as Plaintiff's Exhibit 1 (Transcript, p. 22, lines 14 to 19).

Letter dated April 5, 1918, was admitted in evidence and marked Exhibit 13 and read to the jury; and also letter of September 5, 1918, was admitted in evidence and marked Exhibit 14 and read to the jury; and a letter of June 4, 1919, was admitted in evidence and marked Exhibit 15; and a letter together with an assignment, which assignment was dated September, 1919, was admitted in evidence and marked Exhibit 16 (See Transcript, pp. 23, 24).

Mr. Denman testified that commencing in November, 1917, and ending in December, 1918, the Pacific Cold Storage Company [133] sold including the Tacoma plant a total amount of prop-

(Testimony of Frederick L. Denman.)

erty to the value of $951,835.67 (See Transcript, pp. 32, 33), and that nothing was sold after January 1, 1919, except office supplies of the value of $875.00 and accounts of the value of $309.99 (See Transcript, p. 35, lines 24 to 28, inclusive, and p. 36, lines 5 to 15 inclusive), and that there were no assets converted into money after January 1, 1919, except a total of receipts in the sum of $242,552.88 (See Transcript, p. 34, lines 10 to 14, inclusive); and that said $242,552.88 consisted of notes, bonds, good accounts or liquid assets and that all of it, you might say, was bankable paper (See Transcript, p. 35, lines 17 to 24).

Cross-examination of FREDERICK L. DENMAN.

Frederick L. Denman testified on cross-examination that he had charge of the books of account for nearly eighteen years and that everything was done under his direction so far as the accounting was concerned, and that he was secretary and treasurer for a good many years and in the early days was auditor but only in the year 1912, and that in 1912, when this two and one-half per cent dividend was paid, he was auditor and treasurer; he knew of the entry on the books of the company showing Mr. Richardson was getting a salary of $1,000.00 a month and a sum equal to two and one-half per cent upon all of the dividends paid to the stockholders and he said: "In 1912, when it was first given I knew of it. I was ordered to pay it to him." (Transcript, p. 38.) He signed the last check, the one of January, 1918, for such dividend

(Testimony of Frederick L. Denman.)
and knew that these dividends were being paid every year from 1912 to 1918 inclusive (Transcript, p. 39). He said that he did not at any time ever protest to any of the stockholders or to the [134] company or at any stockholders' meeting against the payment of this two and one-half per cent commission and that he did not dare to because Mr. Richardson was the dominating party. He dominated the company. "I knew my job would be good-bye and between my job and my interest in the company I wanted to stay by and watch them." (Transcript, p. 40, lines 10, 16 and 19.) He said he was there eighteen years and protested to no one as to the dividend and that Mr. Richardson misappropriated the two and one-half per cent commission and yet since 1912 he raised no objection thereto and did not write to any of the stockholders about it and that he did not dare to do so. (Transcript, p. 41.)

Mr. Denman further testified that the page of the yearly report prepared by the accountants Robinson & Company itemizing the salary of Charles Richardson as $12,000.00, twelve months $1,000.00 a month extra based on two and one-half per cent dividend as per resolution of the advisory board $2,500.00 covering the year 1912 was not made up until the board had passed on these accounts and approved of them and this supplementary sheet itemizing the salaries was sent for the information of the advisory board. Mr. Fishburne objected to anything being introduced with regard to the

(Testimony of Frederick L. Denman.)

advisory board as there was nothing to show that there was any recognition of it in the by-laws or any minutes of the trustees or stockholders, and the Court overruled his objection and allowed him an exception (Transcript, p. 43). Over the same objection of Mr. Fishburne Mr. Denman testified that he attached to the report of Smith-Robinson & Company in the year 1912 the supplemental sheet itemizing the salaries and saw that it was mailed and sent to the advisory board in Scotland and that about eighty-five per cent of the stockholders resided [135] in Scotland at that time, and Mr. Fishburne made the same objection as to going into the matter of the advisory board and stated that as to whether it was one per cent or a dozen was immaterial. Over the same objection of Mr. Fishburne the witness testified that at the highest the percentage of stockholders in Scotland was from about sixty-five or seventy per cent according to the stock-books and that a large majority of the stock, two-thirds of the stockholders, resided in Scotland and that these reports in which the two and one-half per cent commission was referred to was sent to the advisory board, and on special examination by Mr. Fishburne the witness testified that the supplemental report itemized the two and one-half per cent commission was sent to David Inglis as secretary of the advisory board and Mr. Fishburne objected to this being gone into as the advisory board was not recognized in the by-laws or resolutions of trustees or stock-

(Testimony of Frederick L. Denman.)

holders, and moved that all of the evidence be stricken. (Transcript, pp. 45, 46.)

Mr. Denman testified that he sent the supplemental report to the advisory board because he was instructed to do so by the President of the company. (Transcript, p. 47, L. 29.) He further testified that during all of the time he never wrote to one of the stockholders in Scotland or Mr. Inglis, the secretary of the advisory board, or anyone else telling them that Mr. Richardson was grabbing off two and one-half per cent, and that he did not write to the other stockholders, the American stockholders either, and had good reason to believe they never heard of it, and that the other stockholders in England never heard of it outside of the little bunch of them. (Transcript p. 48.) He admitted that the first time he called the attention of anyone to the two and [136] one-half per cent commission was in a circular letter of May 1, 1919, sent to the stockholders (Transcript, p. 52, L. 10). He testified that on the supplemental sheet he made just as prominent the two and one-half per cent as a part of Mr. Richardson's salary as he did of the $1,000.00 a month paid him (Transcript, p. 54); that either himself or his assistants with his knowledge put it in the books of account of the company and that he supposed it was done because the advisory committee made the arrangement with Mr. Richardson to allow him two and one-half per cent commission upon the amount of the dividends and not upon the profit (Transcript, p. 55). He stated that he thought the notes of the

(Testimony of Frederick L. Denman.)

Waechter Bros., amounting to $100,000.00 were good.

Q. You think they were good but you knew nothing about it. You didn't know anything about the financial responsibility of Waechter Bros., did you?

A. Yes, I did. I always considered them good, after trading with them for many years and their meeting their obligations, I rather thought they were good; I knew them to have large interests east of the mountains and to be gentlemen of responsibility. (Transcript, p. 56.)

As a director he had knowledge of the payment of the two and one-half per cent commission and never raised any question about it but he was a dummy director for the accommodation and convenience of Mr. Richardson (Transcript, p. 57, L. 27 to 30; p. 58, L. 1). He testified that he knew something about the Alberta property and that something like $300,000.00 was realized on the property, saying: "I gave the figures here. I think that is right," and that he thought it was a good price but Mr. Richardson did not sell that. It was sold by Mr. Davis and that he knew it of his personal knowledge. Mr. Davis was the man that conducted the major [137] part of the negotiations and he made the deal (Transcript, p. 58). He said that Mr. Davis had every authority to make the sales and he knew this from the letters and records of the company, from Mr. Davis' letters to Mr. Richardson and Mr. R.'s letters to Mr. Davis. (Transcript, p. 59.)

(Testimony of Frederick L. Denman.)

As to the interest that Mr. Denman had with Mr. Miller in the Miller stock before the date of assignment he stated that Mr. Miller would buy the shares and he, Denman, had an agreement with him that in case he found a customer for it they would divide the profits, and if he, Denman, was in funds himself he would buy stock of the company that was for sale with his own resources from the stockholders, or in case he was short of funds he went to Mr. Miller and Mr. Miller put up the money and in case Denman found a customer to whom he could sell the stock he did so and they divided profits and he had a contract with Mr. Miller in that regard (Transcript, p. 61).

He said that at the meeting of the Board of Trustees of the Pacific Cold Storage Company held on the 7th of January, 1913, when there were present Charles Richardson, R. J. Davis, A. F. Albertson, F. L. Denman and Charles E. ———, that on motion of Mr. Davis seconded by Mr. Denman it was unanimously carried that the report of the president covering the operations of the company for the fiscal year ending September 30, 1912, together with the statement of assets and liabilities and profit and loss account for the same period was approved and adopted, and to the question asked by Mr. McCord, "Now, Mr. Denman, it was customary at the stockholders' meetings for resolutions to be passed approving accounts of the president and approving accounts which included this payment of two and one-half per cent commission,

(Testimony of Frederick L. Denman.)

wasn't it?" Denman answered: "That was not a lump sum." [138]

By Mr. McCORD.—That is they approved it?

A. It was not segregated at all.

Q. I understand you knew it was in there?

A. It was under the head of salaries of officers and employees. And he testified that he knew it was in there and how the item was made up (Transcript, p. 63).

He testified that from about 1908 to May 31, 1918, he attended every one of the meetings and that salaries were never discussed except by one or two resolutions, and so far as Mr. Richardson's salary was concerned and his commissions they were never discussed, never mentioned at all (Transcript, p. 67, Ll. 26 to 30), and at the top of page 68 of Transcript he again stated that he was at every one of the meetings of the trustees and the question of salary of Richardson was never mentioned at all and that he never talked to any of the trustees as to Richardson's commission, and that "he (meaning Richardson) could have what he wanted. He was dominating the meetings." He stated that he did not know whether the other trustees knew of the two and one-half per cent commission and in answer to the question: "And all of you knew that he was getting the two and one-half per cent commission?" he said: "No, I do not think so."

Q. You do not think they knew about it?

A. They may have known it. I do not know. (Transcript, p. 68.) He testified that in 1915 the

(Testimony of Frederick L. Denman.)

trustees were Charles Richardson, Albertson, Denman, Davis, Bryant, Cox and Harold Sedden and that of these trustees Denman, Davis, Sedden, Cox and Richardson must have known of the commission in 1915 (Transcript, p. 69).

He testified that in 1917 the trustees were Richardson, Denman, Davis, Cox, Sedden and C. A. Miller and that Mr. [139] Miller did not know of the two and one-half per cent commission. "He tells me he did not."

Q. He did not know anything about this two and one-half per cent commission?

A. Well, no, he did not know anything about this two and one-half per cent commission.

But he thought that he did know about the $1,000.00 salary of Mr. Richardson. "I think he told me he did. I probably told Mr. Miller."

Q. In 1918 the trustees were Richardson, Stacey, Miller, Davis, Sedden, V. A. Moore. Every one of those knew of it, didn't they?

A. They are here. They can answer for themselves; I suppose they did.

Q. You knew from your conversation with them they knew it. That is right, isn't it?

A. Mr. Miller did not know it.

At this point Mr. Fishburne objected to the testimony as incompetent, irrelevant and immaterial as to any conversation or anything about it (meaning the commission); if it was not formally adopted as a board of trustees it was immaterial.

(Testimony of Frederick L. Denman.)

Q. (By Mr. McCORD.) Knowledge was brought home to a majority of the Board of Trustees according to your testimony every year of the payment of this two and one-half per cent commission. (Transcript, p. 70, Ll. 6, 10, 19, 23 and 24 to 30.)

By Mr. FISHBURNE.—We object to that as incompetent, irrelevant and immaterial on the ground that it has to be adopted in a legal manner. It would not be any more material whether or not these men knew in an informal way of it than if members of a lodge knew of certain things.

The Court overruled the objection and Mr. Fishburne [140] excepted.

Q. I say a majority of the Board of Trustees every year knew of the payment of the two and one-half per cent commission.

A. It was never discussed in meetings.

Q. I asked you as to your knowledge of those boards.

A. Cannot testify as to their knowledge. I say that they probably knew it. That is all.

He stated that Mr. Miller voted at the annual meeting of January 7, 1919, to fix Mr. Richardson's compensation at five per cent and that he bought the Miller stock subsequent to that date in the summer of 1919 and that Mr. Miller had advised him before he bought the stock as to the fact that he had voted in favor of the adoption of the resolution fixing Mr. Richardson's compensation at five per cent Transcript, p. 71, Ll. 9, 11, 13, 14 and 15 to 30). He testified that the reason he bought the

(Testimony of Frederick L. Denman.)

Miller stock was for his own protection (Transcript, p. 72, Line 6).

He testified that a majority of the stockholders in Great Britain sent their proxies to Mr. Richardson and that Mr. Richardson himself owned about twelve per cent of the stock and that Mr. Richardson had contemplated winding up the affairs of the company for two or three years before he did so and discussed it and urged the stockholders to do it and he was getting a salary then of $1,000.00 a month. (Transcript, p. 78, Ll. 6, 7, 15 to 27.)

Redirect Examination of Mr. DENMAN.

Referring to the minute-book and to the resolution passed on January 7, 1919, awarding Richardson the five per cent commission, Mr. Denman, in reply to the question said that Mr. Ralph Stacey was the first one of the Board of Trustees. [141]

Q. (By Mr. FISHBURNE.) State to the jury what relation Mr. Richardson held to the National Bank of Tacoma at that time. (January 7, 1919.)

By Mr. McCORD.—I object to that as immaterial.

By the COURT.—Sustained.

Mr. Fishburne offered to prove that one of the Board of Trustees was the president of the bank in which Mr. Richardson was a director on January 7, 1919, and that there were three or four of these trustees who were employees of Mr. Richardson working down there for the company at that time.

(Testimony of Frederick L. Denman.)

By the COURT.—Sustained.

By Mr. FISHBURNE.—All right, allow me an exception. I was going to offer it as to Mr. Harold Seddon, who was put in there by Mr. Richardson; Mr. Moore was working for the company as bookkeeper and Mr. R. J. Davis was working for the company and all of their jobs depended on Mr. Richardson.

By Mr. McCORD.—Are you making that as an offer?

By Mr. FISHBURNE.—Yes.

By Mr. McCORD.—I object to the offer.

By the COURT.—The objection is sustained. You cannot attack anything like that. That is collateral, Mr. Fishburne.

By Mr. FISHBURNE.—Your Honor will allow me an exception. (Transcript, p. 84, Ll. 16 to 30; p. 85, Ll. 1 to 9.)

Mr. Fishburne objected to the admission of the financial reports of the auditor with the supplemental statements by Mr. Denman attached and the Court overruled his objection and allowed him an exception (Transcript, p. 85).

Continuing at the bottom of Transcript, p. 85, Mr. Fishburne said: [142]

Q. I will ask you for the reports segregating this two and one-half per cent. You prepared that did you? A. Yes.

Continuing on page 86 of the Transcript:

Q. I will ask you whether or not that supplement went to any of the stockholders. A. No.

(Testimony of Frederick L. Denman.)

Q. To whom did that go?

A. It went to David Inglis, the secretary of the advisory board, at Glasgow.

Q. I will ask you whether or not so far as you know this two and one-half per cent additional was called to the attention of any of the stockholders.

A. I have good reason to think it was not.

Mr. McCORD.—I move to strike it out as not responsive, as improper.

The COURT.—Sustained.

Q. I will ask you whether the report that went to the board of trustees and the report that went to the stockholders—excluding this supplemental report that went over there to the advisory board at Scotland—I will ask you how they referred to the salary or wages of Mr. Richardson, whether it was segregated or the two and one-half per cent was lumped with the salary.

A. It is not segregated.

Mr. McCORD.—I object to that. The books are in evidence and they speak for themselves (Transcript, pp. 86, 87 top).

In Exhibit "A" the report of September 30, 1912, Mr. Fishburne asked, "Where does that refer to the salary?"

A. Under the general heading of office and general expenses; other items of salaries of offices and employees $34,495.00 [143] and that two and one-half per cent of Mr. Richardson's salary is included in that item.

(Testimony of Frederick L. Denman.)

Mr. Denman further testified that the two and one-half per cent was not segregated but in a lump sum under the general heading of expenses, and that it occurred in the same manner in all of the years and that it was not segregated except in the supplemental report, which Mr. Denman made and sent to the advisory board in Scotland (Transcript, p. 87 bottom, 88 top).

To the question asked by Mr. Fishburne: "What if anything was said by Denman to Mr. Richardson as to making this two and one-half per cent a part of the resolutions of the board of directors?" Mr. Denman answered: "In January, 1912, Mr. Richardson informed me that he was to have the two and one-half per cent on dividends additional salary and I suggested to him that it be made a matter of resolutions, or I asked for some authority for the voucher. He said he would give me a letter instructing me to pay it to him, something I could use for authority in making payments as auditor of the company, and he did give me such a letter. He never made it a matter of record in the Board of Trustees and that is all I got." (Transcript, p. 88 bottom, 89 top.)

Mr. Fishburne offered to prove by him that a majority of the board were employees of Mr. Richardson, owed their job to him or were working for the bank of which he was a director on January 7, 1919.

Mr. McCORD.—Objected to the offer and objection was sustained and an exception allowed (Transcript, p. 90, Ll. 1 to 8).

(Testimony of Frederick L. Denman.)

Mr. Denman further testified that from 1912 down to 1918 and 1919, he could state from memory that Mr. Richardson voted a majority of the stock and that with their proxies and his own stock he controlled a majority of the stock of the company [144] all the time.

He further testified that the supplemental report was on the fly-leaf attached to the back of the report and that he always put it there right after it was made up (Transcript, p. 90 from middle of page to bottom).

Testimony of Charles A. Miller, for Plaintiff.

Examination of CHARLES A. MILLER (Witness called by plaintiff).

Mr. Miller stated he was the Miller who seconded the motion to the resolution of January 7, 1919.

Q. (By Mr. FISHBURNE.) I will ask you whether at the time you seconded that motion for a five per cent commission you knew that Mr. Richardson had been receiving a salary of $12,000.00 a year and had been getting a commission of two and one-half per cent.

Mr. McCORD.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Sustained the objection and allowed an exception. (Transcript, pp. 91, 92.)

The Court said on page 92 of Transcript: "I do not think that a party, a person may be a party to a situation such as is recited in this resolution re-

ferring to the correspondence which appears in the minutes and take affirmative action with relation to its adoption, and having the other party proceed and act upon it and then afterwards say that he did not understand it. They cannot have that issue presented in a collateral fashion. Therefore the objection is sustained. I think it would be manifestly unfair. I do not know any rule by which the Court could admit it."

Mr. FISHBURNE.—Now, in addition to that I desire to state and offer to prove that this resolution had the correspondence already incorporated in it. I offer to prove that this [145] was brought there by Mr. Richardson already typewritten, and I offer to prove that this witness did not know that Mr. Richardson was getting $1,000.00 a month prior to this time or two and one-half per cent commission, and we offer to prove that this witness was taken by surprise when he seconded the resolution.

Mr. McCord objected to the offer as incompetent, irrelevant and immaterial and the Court sustained the objection and allowed an exception. (Transcript, pp. 92, 93.)

On page 94 is a motion for nonsuit made by Mr. McCord after plaintiff rested and on page 103 the Court gave his ruling to the jury on the nonsuit in the following language: [146]

RULING ON MOTION FOR NONSUIT.

NETERER, District Judge.—There is a very recent case decided by the Circuit Court of Appeals,

Ransome Concrete Machinery Co. vs. Moody (282 Fed., page 29). That was tried before Judge Hough, Circuit Judge, sitting as District Judge, and the case was reviewed by the Circuit Court of Appeals. Judge Rogers wrote the opinion. Judge Hough very properly says that:

> "But none of the cases known to me goes so far as to lay down the rule that directors, in all honesty and for the benefit, not only presumed, but actual, of their corporation, may not hire one of their own number as general manager and increase his salary as seems best. There is no legal yardstick; every case stands on its own bottom, and the ultimate question always is whether the contract was honest and beneficial."

Now, that is a controversy between parties who did not have a contract relation.

In this case with relation to the payment of the 2½ per cent commission for the years 1912 to 1916, the plaintiff in this case knew all about it. He was secretary for a time and auditor for much of the time, and bookkeeper all the time, and I guess a member of the board of trustees all the time. He knew about this. The defendant in this case, Mr. Richardson, was a member of the board of trustees as was Mr. Denman, the plaintiff in this case. The cases which are cited here by the plaintiff, so far as endeavoring to establish a fiduciary relation between the defendant in this case and the plaintiff, have no application, and

the corporation [147] was fully advised as to this payment. The payment was inaugurated by a majority of the board of trustees, by the majority of the stockholders representing their local committee, and this was known, as the plaintiff testified on oath, to all the members of the board. A report was made every year including the entire expenses of the office, $34,000 some years and $32,000 some other years, and similar sums other years, and then a supplemental report was presented in which detail was made with relation to all of these expenses, and attached to the report. It is stated that this supplemental report was not submitted to the local board, but that it was sent to the foreign stockholders. But this payment was sufficiently brought to the attention of the corporation that it was the duty of the corporation to bring an action to recover or to cease to approve these reports, as was shown was done. The payment of this amount, if wrongful, if unauthorized, meant of course that action must be commenced by some authorized party within the period of limitation, and the statute of limitation is three years. The plaintiff in this case has no greater right than would the corporation have. The corporation would have to bring this action within three years. The plaintiff in order to bring any action to which he may be entitled or to enforce any remedy which he may have, must bring the action within three years. So that all of the years prior to 1917 are eliminated or barred by

reason of the statute of limitation, so far as the 2½ per cent commission is concerned.

Something was said that Mr. Miller was not a party to this action when it was originally instituted, is that correct? [148]

Mr. FISHBURNE.—What is that?

The COURT.—Someone said Mr. Miller was not a party to this action?

Mr. McCORD.—Suit was brought by Frederick L. Denman and Frederick L. Denman as agent and attorney in fact for Charles A. Miller. Suit was not brought in his name.

The COURT.—When was suit brought?

Mr. McCORD.—Suit was brought under assignment.

The COURT.—When was the suit commenced under the assignment?

Mr. FISHBURNE.—Why suit was brought on the assignment—

(Here counsel consulted pleadings.)

The COURT.—Never mind; you can find it later.

As to Miller and with relation to the resolution, the adoption of which he moved: He is estopped, —the resolution estops him from now questioning it in this proceeding. If he had an equitable right to have that set aside that should have been done, but he could not do it in this proceeding. The equity and legal remedies may not be blended in the Federal court. That is primary doctrine. The plaintiff in this case is estopped from claiming anything under the Miller shares of stock so far

as the 5 per cent commission is concerned; and if Miller became a party to this action prior to the period of limitation with reference to any of the 2½ per cent years of course those may be pleaded by the plaintiff. I do not think that the plaintiff's right of action is barred as to the years 1917 and 1918, and if Mr. Miller comes into this case within three years after any of those years then his action may stand likewise. [149]

Now, as to the distribution as claimed of the $500,000 prior to the adoption of this resolution: There is no testimony, as I said a moment ago, as I recall it, as to when that was paid. Plaintiff states he knew nothing about the adoption of this resolution or payment of this 5 per cent commission until afterwards, until it was paid I think he said. I do not know but what he said until after this action was commenced or about the time it was commenced. Now, I think so far as the plaintiff is concerned in this case he would not be bound or would not be estopped by that resolution for compensation which was paid or commission which was paid for services which were not actually rendered. If the $500,000 had already been collected and paid, then no service was rendered so far as this plaintiff was concerned with relation to that $500,000. The defendant would be entitled to credit for a reasonable compensation so far as this plaintiff is concerned for any service rendered in the liquidation of the concern. The defendant would be entitled to reasonable compensation for that service, whether it would be five

per cent or whatever it would be, and if he was paid the salary while the $500,000 was distributed prior to the passage of this resolution then of course plaintiff I do not think would be charged with extra compensation, and that will be the ruling of the court.

Mr. FISHBURNE.—Your Honor will allow me an exception, to your ruling?

The COURT.—Yes. [150]

Mr. McCORD.—In order to prepare my testimony, I desire to inquire—all claims prior to 1917 are barred as to the 2½ per cent?

The COURT.—Yes.

Mr. McCORD.—Both of the Miller claims and the claim of the plaintiff himself?

The COURT.—Yes.

Mr. McCORD.—And so far as the 5 per cent compensation is concerned the right of the plaintiff to recover on the shares acquired from Miller is barred, as I understand that?

The COURT.—How is that?

Mr. McCORD.—The plaintiff owns 60 shares of stock?

The COURT.—Yes.

Mr. McCORD.—And he acquired the balance from Mr. Miller?

The COURT.—Yes.

Mr. McCORD.—I understood you to say—

The COURT.—He can recover. Plaintiff may recover 2½ per cent commission on his 60 shares unless this was authorized by the board.

Mr. McCORD.—I mean as the case stands now.

The COURT.—If this is authorized by the board. As the testimony is now he may recover on his 60 shares for '17 and '18, 2½ per cent, and he may recover for his share of the $500,000 distributed in September if it was distributed, and I will permit him to show that in the morning, and he may recover also on the Miller shares for 2½ per cent commission for the years 1917 and 1918 if Miller came into the case within three years after 1917 or within three years of 1918, either of those years. [151]

Mr. McCORD.—That is as to the 2½ per cent?

The COURT.—As to the 2½ per cent, but on the Miller shares he cannot recover on anything, but he may recover on the $500,000, what would be due on his share of the 5 per cent if the defendant was paid his salary during that time and also on the balance of the amount distributed excepting that the defendant may show what would be the reasonable compensation to be paid for the services which he performed after his salary ceased.

Mr. McCORD.—Then as I understand, the Court grants the motion as to the fourth cause of action, which is the Miller claim.

The COURT.—Yes, if that is the fourth cause of action.

Mr. FISHBURNE.—The fourth cause of action is the Miller claim.

Mr. McCORD.—Yes, the fourth cause of action is the Miller claim; that is granted?

The COURT.—Yes.

Mr. McCORD.—Granted in part as to the statute of limitation?

The COURT.—Except those two years.

Mr. FISHBURNE.—As I understand the Court's ruling, the motion is not granted as to that part, so far as Mr. Miller is concerned, relative to the $500,000 of capital return.

The COURT.—Miller was barred altogether because he was there and he made the motion and knew everything that went on and he has been a member of the board of trustees and is charged with knowledge.

Mr. FISHBURNE.—Your Honor will allow me an exception.

The COURT.—Yes.

(Adjournment.) [152]

November 9, 1922.

At 9:30 A. M., the trial of this cause was resumed, the jury all being present.

The COURT.—For your information, gentlemen of the jury, I will state that last night, after you and before we adjourned, I sustained the motion in this case made on the part of the defendant to eliminate from this case all of the claims for 2½ per cent commission that were paid prior to January, 1917, and also to eliminate from the case the 5 per cent commission claimed on account of the stock held by Mr. Miller. He having moved the adoption of the resolution which authorized the payment of the 5 per cent, and the plaintiff in this case, Mr. Denman, knew of that when he acquired

that stock and Mr. Miller would be estopped to now come in in this legal proceeding and that he should recover the 5 per cent which he helped authorize to pay. So that what we are to try in this case now will be the amount of the recovery that the plaintiff in this case, Mr. Denman, may have on his 60 shares of stock, which will be 2½ per cent of the dividend paid,—I mean unless the defendant shows that he was authorized by the proper authentication which will be developed during the course of the defense; and also Mr. Miller at this time may be permitted to receive 5 per cent commission on the stock returned, except that the defendant would be entitled to a credit for the reasonable value of the service which he performed after he ceased to receive the salary that was paid him, a thousand dollars a month from time to time. I think that perhaps advises [153] you fully. The defendant will now put in his defense to show why these payments should not be allowed and then that will be the issue. The plaintiff may show this morning further when this $500,000 was paid, the first $500,000 of returned capital,—when that was actually returned.

Mr. FISHBURNE.—May it please the Court we desire to except to the Court's ruling as to the exclusion of that part of the first cause of action running back of January 1, 1917, on the ground that it is not barred by the statute of limitation because of the fact that the defendant was a trustee and it was a continuing trust, that payments from year

to year down to the year of bringing this suit were made, and that the statute of limitations does not run against the *cestui que trust* in favor of the trustee until the trust has been repudiated by the trustee and repudiation has been brought to the attention of the *cestui que trust.*

We desire to except to that part of your ruling excluding the claim of Mr. Miller on the ground that under the doctrine of estoppel a man cannot acquire property unlawfully and then set up his own wrong and try to estop an innocent person because he says he was mislead by his own wrong, the law being that estoppel cannot be plead in favor of a man's own fraud.

The COURT.—Make your objections or exceptions without argument. [154]

Mr. FISHBURNE.—And we also desire to except to that part of your Honor's ruling allowing any offset to the defendant of a reasonable compensation, on the ground first that the trustees were not given any authority in the resolution empowering them to liquidate; on the ground, second, that the trustees had no power to delegate their authority to Richardson; on the ground, third, that the trustees had no power to allow Richardson his salary; on the ground, fourth, that the trustees had no authority to approve of allowing Richardson a salary for back pay, because the resolution in itself says that this compensation is to be allowed for the service of liquidating the company, and the evidence shows that too.

The COURT.—State your objection without argument.

Mr. FISHBURNE.—I just want to call to your Honor's attention all of my points.

The COURT.—I don't care anything about that, I know what they are.

Mr. FISHBURNE.—And that after September 7, 1919, there was no liquidation, no conversion of assets into money, other than bankable paper. All the defendant had to do would be to immediately convert it into money, and there were no services rendered after this resolution of January 7, calling only for back pay; and on the further ground that at the time that his salary ceased on [155] September 30, 1919, there was no resolution allowing him any pay for services in the future. Your Honor will allow me an exception to your Honor's ruling.

The COURT.—Oh, yes, sure. I think I might say for the benefit of the record that this case was commenced as a law action, insisted upon by the plaintiff as a law action throughout the entire litigation; that the objections urged by the defendant are matters which pertain to equitable actions. In the Federal court a party may not commingle legal and equitable remedies. If the plaintiff has any relief, equitable relief, that might be urged, it must be done in an equitable proceeding, and this is not such a proceeding and has been constantly insisted upon by the plaintiff as a law action and this case has proceeded as a law action, and equi-

(Testimony of Frederick L. Denman.)

table rights, if there are any, may not be urged in a law action.

Mr. FISHBURNE.—We further desire—

The COURT.—Note exception.

Mr. FISHBURNE.—I thank you, your Honor. We further desire to object to the introduction of any evidence by the defendant.

The COURT.—Are you going to introduce any evidence now as to when this payment was made.

Mr. FISHBURNE.—Yes, I will introduce it now. [156]

The Court allowed the plaintiff exceptions to his rulings. (Transcript, p. 106.)

Mr. Fishburne further objected to the introduction of any evidence by the defendant (Transcript, p. 106).

Testimony of Frederick L. Denman, in His Own Behalf (Recalled—Redirect Examination).

FREDERICK L. DENMAN, on redirect examination (Transcript, pp. 107, 108), testified that the $500,000 that was voted but returned as a capital reduction to the stockholders was returned on the 15th of September, 1918, as shown by the cash-book page 274 and the voucher record page 202 of the books offered in evidence; and that he took his commission on said $500,000 in January, 1919, out of the remaining assets of the company.

On cross-examination Mr. Denman testified that he got his share of the $500,000 returned on the 15th of September, 1918, and that the company at that

(Testimony of Frederick L. Denman.)
date in cash and quick turning bonds had plenty of resources with which to pay the checks but that he did not know the cash balance of the company on September 15, 1918 (Transcript, p. 111, L. 13, p. 112, Ll. 2, 3, 15).

Mr. Fishburne objected to the introduction of any evidence on the part of the defendant and the Court overruled same and allowed him an exception. (Transcript, pp. 114, 115.) Mr. Fishburne also moved for judgment on the pleadings and the statement of counsel on the ground that there was no defense shown and no authority for the advisory board and no authority shown for any actions of the board of trustees and the motion was denied and exceptions allowed (Transcript, p. 115).

Testimony of Charles Richardson, in His Own Behalf.

Mr. CHARLES RICHARDSON, the defendant in the action, testified as follows:

That the question as to the liquidation of the Pacific Cold Storage Company came up the last time he was in Scotland. [157] He could not recall when but thought it was either in '13 or '14. "Some of the stockholders over there felt that in case of my death they would be helpless over here and we were discussing as early as '14 and '15 the question of selling the cold storage company as a going concern and it came up during my visit to Scotland, I think in 1914 but I cannot remember

(Testimony of Charles Richardson.)

accurately. * * * Then it continued in discussion with them and with the board here up until the final liquidation and in the correspondence with the advisory board, which is on file with the company and has been on file all the time." (Transcript, p. 118 bottom, p. 119 top.)

He was asked by counsel as to the formation and organization of the advisory board and Mr. Fishburne objected to this testimony as being incompetent, irrelevant and immaterial and the objection was overruled by the Court and his exceptions allowed. Mr. Richardson testified that when the company was organized the stock in Scotland and England was 85% of the stock and that he was unwilling to assume the whole responsibility for the company and suggested at a stockholders' meeting over there that they appoint a committee to work in harmony "with us over here," which they did and that went into effect "it seems to me, like in 1901 or '02 (Transcript, p. 119, bottom).

He further testified that during the early part of the existence of the advisory board J. A. Mitchell was secretary and he was superseded by David Inglis who had his office at Glasgow, Scotland. (Transcript, p. 119 bottom, p. 120, L. 1.)

To the question: "What was the course of dealing between you and this advisory board as to the policy of the company?" Mr. Fishburne raised the same objection and the Court made the [158] same ruling and allowed him an exception.

(Testimony of Charles Richardson.)

In reply to the question Mr. Richardson testified that from the very inception of the company and after that date "I think at one time a little more than 85% of the stock was owned over there. I think in the early days of the company I was practically the only stockholder over here. There were just a few scattered shares. I felt that they had no way of expressing their views as to the policies of the company and that I was under obligation as near as possible in every way to carry out their wishes, which I did through the history of the company."

To the question whether he communicated to them frequently, he said: "I suppose I have written thousands of letters. I made an annual report every year to the advisory board in detail and sent them the accountant's reports made by Mr. Denman and Mr. Morehous, which were on file in Glasgow and remittances were made to them and they circularized the other stockholders and most generally sent them the checks. In other words we obeyed their instructions throughout the entire history of the company." (Transcript, p. 120.)

He further testified that from the beginning of the company he called in each year a disinterested public accountant and the entire books and affairs of the company were gone over every year by these disinterested public accountants, and every year a report was made and filed in Glasgow, Scotland, and the stockholders were circularized as to what had been done and regarding the dividends and were

(Testimony of Charles Richardson.)

always consulted to determine what dividends should be paid, and that such reports were addressed to the Board of Trustees and to him as president; that as soon as the report of the accountant Mr. [159] Morehous came in and he had received from Mr. Denman his detailed statement which consisted of a statement of the salaries, amount of salary paid to various employees of the company and the operation of the steamers and in fact all the little details that were not stated in the report by the certified public accountant, that was attached to the accountant's report and as soon as he received those two he sat down and wrote from ten to fifteen or twenty pages to the advisory board stating "what we had done during the year; if there had been a loss at this point or the other and all the intimate details of the affairs of the company. These reports were filed every year and they were sent over at the same time with the statement of Mr. Denman and Mr. Morehous and the other certified public accountants; they were sent over to the advisory board and filed in Scotland for the information of the stockholders over there." (Transcript, pp. 121, 122.) In reply to the question: "If that report of the public accountant and Mr. Denman's supplemental report were brought before your stockholders at that time," he said: "They were always brought before the stockholders and trustees and the report that I made as a rule I wrote it out in pencil and called

(Testimony of Charles Richardson.)

the board together and submitted it to them, Mr. Davis, Mr. Denman and all the rest of them before I had it typed as a proper expression of the year's business so that if they had any suggestion to make it could be incorporated. Sometimes they would have suggestions to make which would be incorporated in it." He said that in the course of a month after these reports were sent over he would get an answer from Mr. Inglis and the advisory board stating in what respect they approved of the reports and whenever that was received he would call a meeting of the [160] board and read that to them and then when they had their regular trustees' meeting the accounts came up and there were no changes made in them and they were always approved by the Board of Trustees here and generally at the stockholders' meeting. (Transcript, pp. 122, 123.)

To the question whether the two and one-half per cent commission item was in the reports he said: "They were attached to the reports all the time, the reports filed here and the reports filed in Glasgow. Mr. Morehous, the chartered accountant, summarized the salaries, but Mr. Denman always gave them in detail and the detail was the same in total as the summaries that the certified public accountant made." That the reports containing reference to the two and one-half per cent commission was always brought to the attention of the Board of Trustees and approved without dissenting voice that he ever heard of. (Transcript, p. 123.) That at

(Testimony of Charles Richardson.)

everyone of the annual meetings the report of Mr. Denman showing this two and one-half per cent commission was always approved unanimously by the trustees and to the question: "And usually you say, by the stockholders?" he said: "I think so. I think the books will show that the stockholders voted on them." (Transcript, p. 124, Ll. 1 to 4, 7, 8.)

The witness then read to the jury part of identification 14–A and testified that those accounts were submitted to the stockholders every year over on the other side and on this side and offered in evidence 14–A, and Mr. Fishburne objected to it as incompetent, irrelevant and immaterial on the ground that it was a transaction between the defendant and the advisory board and the Court overruled the objection and allowed him an exception. And thereupon 14–A was marked and admitted [161] in evidence. (Transcript, p. 124, 125.) He further testified that every year while the company was in existence a report similar to Exhibit 14–A was sent to the advisory board and that "we would get back comments and criticisms from the advisory board as to how they considered it and their advice as to what proceedings we should take and how we should further conduct the affairs of the company."

At this point another report to the advisory board was marked for identification 15–A and Mr. Fishburne made the same objection to this as to the preceding report and that it was incompetent, irrelevant and immaterial as a communication to the

(Testimony of Charles Richardson.)

advisory board concerning Richardson's salary, and the Court made the same ruling and allowed an exception, and it was stipulated by Mr. McCord with Mr. Fishburne that as to these letters he could have an objection and exception to each of them, and the Court said: "Let the records show that plaintiff objects to the introduction of all of these letters of communication with the advisory board on the same ground and that the objection is overruled and an exception is noted." (Transcript, p. 125.) Thereupon Defendant's Exhibit 15–A, a copy of letter of Mr. Richardson's of March, 1917, was admitted in evidence and Defendant's Exhibit 16–A, a letter of May 1, 1917, and Exhibit 17–A, letters of March and April, 1918, to Inglis, were all marked and admitted in evidence. (Transcript, p. 126.)

Q. In order to procure the money to make your distribution and the return of your capital to the stockholders, did you have anything to do with the sale of those notes? (Meaning the Waechter notes.)

A. We did not have money enough to finish the payment and [162] we had notes, as I remember it, for something like $80,000 or $90,000, Waechter notes, two notes, I cannot recall the exact amount, but it was approximately $80,000 or $90,000. We were in the process of liquidation and I did not think we had a right in liquidation to endorse notes and so I went to Mr. Thorne in the bank and got him to take these notes on my moral representations that I would see that they were paid, without recourse, which the bank did.

(Testimony of Charles Richardson.)

Q. The Pacific Cold Storage Company endorsed them without recourse, but you guaranteed the payment of them personally.

A. Practically so, I was a director of the bank and I told Mr. Thorne I would see that they were paid. (Transcript, pp. 128, 129.)

As to the $500,000 reduction of capital stock on September 15, 1918, he testified that on that date according to his recollection the company did not have enough money by something like $250,000 to meet that payment in full. "We had some notes coming in that we could depend upon." (Transcript, pp. 129 bottom, 130 top.) As to what trouble he had with the Waechter note he testified that Mr. Stacy, the president of the bank, telegraphed him that Waechter had not met the notes "and I came up immediately from Pasadena and got hold of Waechter and arranged it so that they would get their money eventually." (Transcript, p. 130.)

Subject to the same objections by Mr. Fishburne allowed by the Court copies of letters and cablegrams of July and August, 1918, between Inglis and Richardson were received in evidence and marked Defendant's Exhibit 18–A. (Transcript, pp. 130, 131.)

To the question whether he had any discussion of this [163] proposed liquidation and the compensation to be paid him for this service with other members of the board of trustees of the company at Tacoma, he said: "I had commenced as early as

(Testimony of Charles Richardson.)

1917 before any of the assets were sold. The question of my compensation was discussed and agreed upon by the members of the board and by the board.

Q. (By Mr. McCORD.) I mean by the members of the board while the board was in session.

A. Yes, at a called meeting. The only reason it was not made of record was that we used the argument that if we gave notice to our competitors and to the public in general that we were going to sell our assets it would enable our competitors to demand a low price from us and they would think we were under compulsion and we would get a less amount for our assets.

Q. Now, on the receipt of this cablegram from the advisory board on August 18, 1918, I will ask you whether at that time a meeting of the board of trustees of your company was called and whether at that time the matter was considered.

A. It was considered. (Transcript, p. 131.)

Q. Do you recall who was present?

A. Well, I remember Mr. Denman, Mr. Davis.

Q. I mean in 1918.

A. You mean the day of the telegram?

Q. Yes.

A. Well, Mr. Davis was present at one. I cannot recall the exact date but Mr. Davis was present.

Q. Do you recall the trustees for the year 1918?

A. Yes, Mr. Davis, Mr. Seddon, Mr. Cox and Mr. Denman.

Q. Was Mr. Denman trustee in 1918? [164]

(Testimony of Charles Richardson.)

A. Yes, he was trustee, I think.

Q. What about Mr. Miller?

A. I think Mr. Miller was trustee at that time.

The witness then referred to paper and said: "Mr. Richardson, Mr. Denman, Mr. Davis, Mr. Cox, Mr. Seddon and Mr. Miller were trustees for 1917, and that Mr. Denman was not a trustee in 1918.

Q. Now, when this telegram was received from Mr. Inglis saying he accepted your proposition to do this work for five per cent, I will ask you whether or not you had a meeting of the trustees called?

A. I had and this correspondence was read to them.

Q. It was read to them and what action was taken?

A. Well, it was agreed to by all of them present.

Q. Did anybody object to it? A. Nobody at all.

Q. Was it at a regular meeting?

A. No, it had been in the files and many letters received and had been discussed for years.

Q. I mean, after the receipt of this telegram or receipt of the letter following it about the 18th of August. I want to know who was present at the meeting where this matter was considered and where you read them the correspondence?

A. I think Mr. Denman and Mr. Moore.

Q. Mr. Denman was not a trustee?

A. I thought you meant in '17.

Q. No, in 1918.

A. Mr. Stacy and Mr. Moore—and I do not know;

(Testimony of Charles Richardson.)

I cannot recall who was present. I know there was just a mass of them there.

Q. I want to know whether you called a meeting and notified [165] them in accordance with the by-laws to be present. A. I did.

Q. And at that meeting you submitted these letters and this telegram and told them all about it and they approved it as I understand it.

A. Correct; yes.

Q. But it was not spread upon the minutes of the meeting?

A. No, it was not in general, because we did not want the public to know what we were doing. (Transcript, pp. 132, 133, 134 top.)

He testified that on January 7, 1919, a resolution was introduced and that he had nothing to do with its preparation and Mr. Harold Seddon, with whom he had discussed the matter ever since 1915, wrote the resolution himself and offered it "and I submitted the correspondence with Mr. Inglis and requested a vote on it, and it was passed without any statement of mine, excepting of the introduction of the correspondence between the advisory board and myself."

Q. That action was confirmatory of the more informal action take at the meeting in August?

A. Yes, the understanding had been in existence for years.

Q. (By the COURT.) The resolution was passed January 7, 1919?

A. Yes, one of the reasons, as I say, for delay in

(Testimony of Charles Richardson.)
putting that resolution on the records was because of the negotiations we were having. For instance, take Waechter Bros.: Waechter was a competitor of ours at Fairbanks and Dawson and we knew if they got information that we had passed a resolution closing up the affairs of the company we never would be able to make a sale with him or to do any business with anybody in reference to the assets of the company and for [166] that reason all of these things were delayed. (Transcript, pp. 134, 135.)

He testified that in his judgment it was reasonably worth to convert these assets into money and distribute them back to the stockholders ten per cent, which would be something like $100,000, and to the question and answer Mr. Fishburne objected on the ground that it was incompetent, irrelevant and immaterial and it was for back service. The objection was overruled and exception allowed. (Transcript, p. 136 top.) Over the objection as incompetent, irrelevant and immaterial and with the exception allowed, he testified that every single one of the American stockholders signed a statement which Mr. McCord had there that they regarded the commission as fair and the services as rendered worth it and Mr. Denman was the only one that had ever made any complaint and 99.64% of them had agreed to it. (Transcript, p. 137 bottom, p. 138 top.) Mr. Fishburne further objected to any evidence as to what the other stockholders had done individually on the ground that if this money was

(Testimony of Charles Richardson.)
wrongfully taken from Mr. Denman it would not make any difference if all of them consented to it. (Transcript, p. 138, Ll. 15 to 20.)

He testified that he paid Mr. Davis $5,000 and Mr. Moore something like $1,000 or $1500 for assisting him after their salaries ceased and that there were quite a number of others he was going to pay as soon as this litigation was settled.

That there never was a sale of a single asset of the company "so far as I remember, or a single transaction had with regard to it that was not directed by me indirectly or directly." (Transcript, p. 139.) He testified that most of the stock that was subscribed for the company was subscribed at his instance [167] and he felt responsible for it and assumed that responsibility from the inception of the company until the winding of it up and that he decided everything. (Transcript, p. 140.)

He further testified that Exhibit 20–A, a printed circular, was received from Mr. Inglis and that similar documents were distributed by the advisory board every year on receipt of the annual reports and that he knew this from correspondence with Mr. Inglis and that Mr. Inglis would send copies of the circulars with his letters and files, and the circular was admitted in evidence and marked Defendant's Exhibit 20–A, Mr Fishburne objected to any testimony with regard to it on the ground that there was nothing to show that he knew of his own knowledge that the circular was distributed, but the Court

(Testimony of Charles Richardson.)

allowed the evidence over this objection. (Transcript, pp. 142 bottom and 143 top.)

He testified that the two and one-half per cent commission and $1,000 a month salary paid him were always discussed annually by the board of trustees at regular meetings of the Board of Trustees. (Transcript, p. 144.)

The witness further testified: "I organized the Pacific Cold Storage Company in 1897–98. The capital stock was originally $150,000, which was increased to $500,000 and later to $1,000,000."

The witness was asked to state in a general way what properties the corporation had in 1917, where they were located, and in what places and territories and in reply he stated: that the Pacific Cold Storage Company operated its plant at Tacoma on the wharf and that the company did a large freezing and cold storage business, aggregating a good many thousands of dollars a year and that they had stations at Nome, St. Michaels, Fairbanks, Tenana, Ruby, Iditerod, Eagle, Dawson, in Alaska and had two ranches in Alberta, that one of these ranches had 650 acres and quite a little bit of leased land and the other had a little [168] less than that. They had about 5,000 head of cattle and were engaged in raising and fattening cattle. That the company had a lease in Saskatchewan and about 250 horses and had cold storage steamers on the Yukon which they operated between Dawson and St. Michaels. That they had refrigerator barges that they had built and that were stationed at Fair-

(Testimony of Charles Richardson.)
banks and Iditerod and that they were operating on the rivers up there. That they operated the steamer "Elihu Thompson" between Tacoma and Alaskan ports, and also a vessel known as the "Dashing Wave" and other refrigerator boats. They shipped cattle and supplied the Government at all Alaskan ports with their meats and were doing business practically all over Alaska and on the creeks where they did not have cold storage they would send their cattle up and butcher them there and sell them to the local mining plants. The cattle from Alberta were shipped to Alaska for that purpose. They had feeding stations in Idaho and Oregon and owned property all over the Northwest. (Trans., 117.)

Over the objection of plaintiff's counsel, which was overruled and an exception allowed, the defendant testified that "when the company was organized and the stock was subscribed in Great Britain constituting Scotland and England, I was unwilling to assume the whole responsibility for the company as they had 85% of the stock, so I suggested at a stockholders' meeting over there that they appoint a committee to work in harmony with us over here, which they did, and that went into effect, it seems to me like in 1901 or 1902. * * * I felt that they had no way of expressing their views as to the policy of the company and that I was under obligation as near as possible in every way to carry out their wishes, which I did through the history of the company," that he wrote thousands of letters to

(Testimony of Charles Richardson.)

Mr. Inglis, the Secretary of the advisory board in Scotland and that he made annual reports every year to the advisory board and sent the accountant's reports made by Eli Moorhouse & Co. and the supplemental report made by Mr. Denman, which were placed on file in Glasgow and that remittances were made to Mr. Inglis and the remittances were sent out with circularized letters to the stockholders. That the board of trustees of the company followed, during its entire history, the advice and directions of this advisory board, which represented 85 per cent of the stockholders of the company. That each year he called in *a* disinterested [169] certified public accountants like Price, Waterhouse & Co. and Eli Moorhouse & Co., and that the 2½ per cent commission was always brought to the attention of the board of trustees and approved every year without dissent so far as he had ever heard, and at a regular meeting or a called meeting, and if at a called meeting after notices had been sent out according to the by-laws, and that the 2½ per cent commission was always approved unanimously by the trustees, and to the question: "And usually, you say, by the stockholders?"

A. I think so. I think the books will show that the stockholders voted on them.

That the reports of the public accountants, with the supplemental report of Mr. Denman, disclosed the fact of the payment of the 2½ per cent commission from 1912 down to the liquidation of the company and that these reports were examined by the

(Testimony of Charles Richardson.)

advisory committee and as soon as the report from Mr. Inglis was received, the reports, with his criticisms and comments were taken up and approved by the board of trustees of the company and by the stockholders.

Q. Well, in reference to salaries, that is the point here, the 2½ per cent commission, was that item in those reports?

A. They were attached to the reports all the time, the reports filed here and the reports filed in Glasgow. Mr. Moorhouse, the chartered accountant, summarized the salaries, but Mr. Denman always gave them in detail and the detail was the same in the total as the summaries that the certified public accountant made.

Q. Were those reports containing those references to the 2½ per cent commission which had been paid to you, brought to the attention of the board of trustees? A. Always and approved.

Q. What is that?

A. Brought to their attention and approved every year.

Q. Without dissent voice? Or how was it?

A. Never was as I ever heard of, any dissent.

The COURT.—Let me ask for information, was this at a regular meeting of the board?

A. Yes, either a regular or called meeting. [170]

The COURT.—But if meetings were called, notices were sent out?

A. They were sent out according to by-laws.

Q. At every one of your annual meetings, as I

(Testimony of Charles Richardson.)

understand you, the report of Mr. Denman showing this 2½ per cent commission was approved?

A. Always.

Q. Unanimously by the trustees? A. Always.

Q. And usually, you say by the stockholders?

A. I think so, I think the books will show that the stockholders voted on them. (Trans., 123–125.)

Mr. Richardson testified that he negotiated the sale of the "Elihu Thompson" to the Pacific Whaling Company.

Q. And you received $142,500 net?

A. Well, we got better than that. We made him agree to carry our beef north, I think it was, for $40 a ton, and we got a contract with Waechter Bros. for $60, producing something like $160,000, less commissions that are usually paid. We got about $150,000 for it and we were carrying it on the balance sheet at $45,000. I got about $110,000 or $115,000 more for her than we were carrying it at.

Q. That was in the spring of 1918? A. Yes.

Q. What did you get in the way of cash?

A. I do not remember the exact amount, we got a little cash and we got some Canadian bonds and I think a note, and it was all safe and secure and all finally paid.

The witness stated that he sold the Alaska assets to Waechter Bros. for $125,000 in cash and $25,000 in the stock of the company.

Q. In order to procure the money to make your distribution and [171] the return of your capital

(Testimony of Charles Richardson.)

to the stockholders, did you have anything to do with the sale of those notes?

A. We did not have money enough to finish the payment, and we had notes, as I remember it, for something like $80,000 or $90,000, Waechter notes, two notes, I cannot recall the exact amount, but it was approximately $80,000 or $90,000. We were in the process of liquidation and I did not think we had a right in liquidation to endorse notes and so I went to Mr. Thorne in the bank and got him to take these notes on my moral representations that I would see that they were paid, without recourse, which the bank did.

Q. The Pacific Cold Storage Company endorsed them without recourse, but you guaranteed the payment of them personally.

A. Practically so, I was a director of the bank and I told Mr. Thorne I would see that they were paid.

The Cold Storage Company endorsed the notes without recourse. That if a sale had not been made by him at the time it was made they would still be doing business in Alaska as there never was a time subsequent to the trade with Waechter Bros. when they would have paid anything like the price that was paid for the property.

He further testified that he paid to the stockholders during his administration, as dividends, $1,300,000 and returned in addition upon the liquidation of the company $1,050,000, after the payment of all expenses. To the question as to how

(Testimony of Charles Richardson.)

much his services were worth independent of any contract, to which question Mr. Fishburne objected on the ground that it was incompetent, irrelevant and immaterial, and that it was for back services, and the objection was overruled and exception allowed, the defendant stated that it was worth 10 per cent to liquidate the company and return the capital to the stockholders independently of any contractual relations between him and the corporation.

Q. Now, I will ask you whether the American stockholders took any action with regard to approving the payment of this commission to you?

A. Every one.

Q. Every single one of them signed a statement which you have there that they regarded the commission as fair, and the [171½] services as rendered were worth it. In fact, out of all the trustees, Mr. Denman is the only one that has ever made any complaint out of it, 99.64 per cent of them have agreed to it (Trans., 137, 138).

Q. Now, in so far as the disposition of these assets was concerned Mr. Denman said you had nothing to do with it. I would like you to explain just what you did in winding up this corporation.

A. There never was a sale of a single asset of this company, so far as I remember, or a single transaction had with regard to it, that was not directed by me, indirectly or directly.

Q. Now, in the sale of the "Thomson" and other assets in Alaska?

(Testimony of Charles Richardson.)

A. I sold the "Thomson" individually myself and I had the transaction.

He also stated that he sold the Alaska properties to Waechter Bros. individually. "If I had not made the sale to Waechter Bros. we would have been doing business in Alaska until to-day. In 90 days after we sold I would not have realized 50 cents on the dollar."

Q. And all the properties in Alberta?

A. I did that through Mr. Davis and Mr. Cox, and before they went to Alberta, I had a day or two conference with them in which I directed every single thing they were to do up there.

Q. Did you know that Mr. Denman tried to organize a company to take over the assets of this company, or part of them for himself,—did you have any discussion of that sort with him?

A. That incident came up on time in a meeting and it was at the meeting in which I had explained my commission. Mr. Denman during the course of the meeting, said he thought he could organize a company that would buy up part of the assets of the company, and I remarked to him that nobody connected with the Pacific Cold Storage Company was going to buy its assets or have anything to do with the purchase of it.

Q. Did you notice in one of Mr. Denman's circular letters, notwithstanding [172] that position that you took, that you did buy some of the accounts for seven or eight hundred dollars, and realized a profit of $250 on them?

(Testimony of Charles Richardson.)

A. "It was not accounts. I think it was in reference to the stock we held in Waechter Bros. In order to get a good price for that, we had an auction sale, sold it at an auction, and at the auction I bid on it and tried to force Waechter Bros. to pay a good price, but it fell to me for something like $30000 and I afterwards sold it for $3250, or some such matter. There was a profit of $200 or $300 which I turned back to the company.

Q. "That is the only instance you bought any property?

A. "That is the only instance in which I had any interest in any of the assets of the Pacific Cold Storage Company.

Q. "And you bought it at that auction?

A. "I bid on it in order to try to get a good price and unfortunately it fell to me and then I sold it at a profit and turned the profits back to the company, as the books will show." (Trans. 141, 142.)

Q. "Now, Mr. Richardson, how does it happen that on the minute-books of the proceedings of the board of trustees there is no reference made to the fixing of salaries?

A. "Well, I do not know. I did not think that the salaries were ever put on the minutes. I have never been connected with a corporation where it was done.

Q. "Was it discussed at meetings?

A. "Always discussed.

Q. "Always agreed to? A. Yes.

(Testimony of Charles Richardson.)

Q. "And no written memorandum of it taken?

A. "No, for the reason, I think mainly, in case we wanted to change the salary during the year we would be at liberty to do so, and we did not care to make a binding contract with anybody. [173]

Q. But at the meeting of the Board of Trustees annually, were the salaries discussed?

A. Always, and agreed upon.

Q. And was your salary agreed upon and discussed? A. Always.

Q. That is this 2½ per cent commission and thousand dollars a month was discussed annually?

A. Always.

Q. By the board of trustees? A. Yes, sir.

Q. At regular meetings of the board of trustees?

A. Yes. (Trans., 143, 144.)

Referring to the Defendant's Exhibit No. 22-A Mr. Richardson testified over the objection and exception requested by Mr. Fishburne:

Q. That was continued during all the years you were president? A. Yes.

Q. That letter was received by you in due course of mail? Within a reasonable time? A. It was.

Q. Was that brought to the attention of the board of trustees?

A. Submitted to Mr. Denman, and to the board of trustees and was aproved.

Q. Now was that same relationship, arrangement, continued during the intervening succeeding years?

A. All of the time up to the last, 1918, when I

(Testimony of Charles Richardson.)

ceased to draw my salary, without objection or criticism. (Trans., 168.)

Cross-examination by Mr. FISHBURNE.

Q. You stated that prior to January 7, 1919, all this proposition of 5 per cent commission was discussed by the board of trustees, you stated that, did you not? A. Yes.

Q. Do you remember at what time that meeting occurred?

A. I do not think I could tell you, Mr. Fishburne. My memory is not very clear on it. That was done once I know in 1917 when these letters came from Mr. Inglis in regard to it. [174]

Q. And you cannot remember the date in 1917?

A. I do not.

Q. Do you remember there was some discussion in 1918 prior to January 7, 1919?

A. Yes, sir; there was.

Q. What was the date in 1918?

A. I am unable to state exactly the date, but Mr. Davis went to Alberta; it was before Mr. Davis went to Alberta some time. He can refresh my recollection about that time.

Q. Was Mr. Denman on the board in 1917 when this was discussed? A. Yes, I think he was.

Q. You think he was? A. Yes.

Q. Were all the members of the board present there? A. I do not think they were all present.

Q. How many were there, do you remember?

A. I think four, three or four.

Q. Three or four? A. Four perhaps.

(Testimony of Charles Richardson.)

Q. Do you know that all the members present, three or four discussed it at that time? A. Yes.

Q. And in 1918, how many were present to discuss it? A. I think there were four.

Q. Four? A. I think so. In 1918.

Q. And who were they?

A. I think Mr. Stacy and Mr. Moore and myself and Mr. Davis. I do not think Mr. Miller was present. He hardly ever attended any meetings. (Transcript, pp. 144, 145.) [175]

Q. And at that time that you four discussed it was there any resolutions or anything to that effect? A. No; no, there was not.

Q. No oral resolution? A. No.

Q. Just simply a discussion?

A. No, I do not think so. As I stated before, we did not think it advisable to let the minutes show anything about the dissolution and sale of the company. All this correspondence was on file in the company's office, all the time from 1917 up.

At this point Mr. Fishburne objected to the admission of any of this evidence because of the ruling in a Federal case that the mere informal meetings of the board of trustees were not sufficient and that their transactions must be had in a formal manner at a regular meeting in which all of them were there, and the Court overruled his objection and allowed him an exception. (Transcript, p. 146.)

He testified that he left for California in November, 1918, and that he was in Frisco on November

(Testimony of Charles Richardson.)
11, 1918, and that he was up here every thirty or sixty days, three or four or five times, and that he changed his residence from Washington to California when he went down there in November, 1918, sometime. (Transcript, pp. 146, 147.) He testified that the correspondence and negotiations between him and Mr. Davis with regard to the sales of the company property was conducted by correspondence and telegrams.

That when he left for California practically everything had been sold, "pretty nearly everything had been sold in November," and that some time in 1917, in regard to the Alberta [176] sales Mr. Davis and Mr. Cox and himself spent perhaps a week or ten days before he went up there discussing the whole situation and it was decided what they would do in every particular up there. (Transcript, p. 147.) The witness admitted that he sent the telegram marked plaintiff's identification or Exhibit 20 and Mr. McCord objected to its reception as being immaterial and the Court sustained the objection and allowed Mr. Fishburne an exception. (Transcript, p. 148 top.)

He stated that he sold the steamer "Thomson" before he went to California for $150,000 and that he paid Mr. Taylor of Seattle a commission for the sale of $7,500 (Transcript pp. 148, 149). To the question: "Isn't it a fact in the summer 1918, Mr. Denman made an estimate of the amount that would be returned to stockholders, within a dollar on each share, the amount that was paid on each

(Testimony of Charles Richardson.)
share with the exclusion of the five per cent commission? he said: "Mr. Denman may have done that for himself after most of our assets were sold, but the calculations I spoke of antedated that, and was over quite a little period of time before that."

Q. When the question of the five per cent commission was discussed, was Mr. Denman present at any of those meetings? A. Yes.

Q. When the five per cent commission was discussed? A. Yes. (Transcript, pp. 149, 150.)

Testimony of B. A. Moore, for Defendant.

Mr. B. A. MOORE, on behalf of the defendant, testified as follows:

That he was bookkeper and cashier of the company from August, 1901, and remained with the company until September, 1919, and was trustee in 1918 at the annual meeting. (Transcript, p. 151.) A balance sheet of September 3, 1918, was received [177] in evidence and marked Defendant's Exhibit 21-A. (Transcript, p. 155.) He testified that he was present at the stockholders' meeting on the 31st of May, 1918, and that he recalled Mr. Richardson discussing the liquidation of the company and his compensation.

Q. I will ask you whether or not the trustees who were there at that meeting acquiesced in and approved of it? (Meaning the five per cent commission.)

A. I will say so, as I remember it.

Q. Nobody opposed it? A. No, sir.

(Testimony of B. A. Moore.)

Q. Everybody was in favor of it? A. Yes.

Q. Mr. Richardson read the correspondence to you, did he?

A. Yes, sir, before the trustees. (Transcript, p. 156.)

Q. And it was approved by them?

A. It was. (Transcript, p. 157 top.)

Q. Now then, later on during the summer of 1918, do you recall when Mr. Richardson,—I will ask you whether Mr. Richardson showed you correspondence and telegrams he received from the advisory board accepting his offer to do the liquidation work for five per cent? A. Oh, yes.

That the correspondence was submitted to him and he attended a meeting of the Board of Trustees at Mr. Richardson's office about that time on notice. (Transcript, p. 157.)

Q. Do you recall whether Mr. Stacy was there or not at that time?

A. Well, in August of 1918, I think it was likely he was.

Q. What is your recollection? [178]

A. I think the meeting would not be held without his presence.

Q. Who else was there, do you recall?

A. Mr. Stacy, myself, Mr. Richardson and Mr. Davis. (Transcript, pp. 157, 158.)

He said he did not think Mr. Miller was there and he did not remember whether Mr. Seddon was there.

Q. Now, at that meeting I will ask you whether

(Testimony of B. A. Moore.)
any action was taken and was it approved or disapproved by the board?

A. It was approved by the board. (Transcript, p. 158.)

He testified that he was present at a meeting of the trustees of the company on January 7, 1919, when the formal resolution approving the arrangement for the commission of five per cent was formally adopted and that Mr. Seddon introduced the resolution and Mr. Miller voted for it and it was unanimously approved, and no objection was made to it, and that consideration of the reasonableness of his charge was one of the main features of the consideration, and they reached the conclusion that it was reasonable compensation for the services. (Transcript, pp. 158 bottom, 159.) He testified that he never heard any protest on the part of Mr. Denman as to the payment of the two and one-half per cent commission to Richardson at any time until Mr. Denman had left the employ of the company (Transcript, p. 159). He testified that the papers or vouchers accompanying the checks returning $500,000 to the stockholders of the company were dated September 15, 1918, and that he sent off checks for half a million dollars at that time, and that on that date he had about half of the said $500,000 in cash (Transcript, pp. 159, 160), and that the company in sending out these dividend checks to Scotland figured on the fact that it would have thirty or [179] thirty-five days in which to pay them and desired to make the pay-

(Testimony of B. A. Moore.)

ments as early as possible, and those checks were sent out with the expectation that the money would be there to pay them when they came back. (Transcript, p. 160.)

He stated that he never talked to Mr. Miller about the two and one-half per cent commission.

He stated that Mr. Richardson paid him $1,000, for services in liquidation of the company and it might be more. (Transcript, p. 161.)

He stated that he was connected with the company as its cashier and bookkeeper from 1901 and remained with the company until September, 1919. That he was elected a trustee at the annual meeting of the stockholders in May, 1918; that he was bookkeeper of the company and acted under the directions of the plaintiff, F. L. Denman; that he made the entry on the books increasing Mr. Richardson's salary from $1,000 per month by an amount equal to 2½ per cent of the dividends declared and paid to the stockholders; that Denman, during all of the time that he was connected with the company, never criticised this arrangement. At the time of the declaration of the dividend on September 15, 1918, the company had about $237,000 in cash and that the money was called in and paid before the return of checks that were sent to Great Britian, which took about 20 to 30 days from the date of mailing until they were returned for payment.

Q. You had on hand (September 3, 1918) $577,000 worth of stock at Gleichen unsold at that time,

(Testimony of B. A. Moore.)

and you had bills receivable of something over $200,000, it makes about $775,000 or about $800,000. Now outside of the Canadian bonds and your Liberty bonds you had assets of approximately a million, didn't you?

A. Yes, better than a million. [180]

Q. "And the condition of the company was practically the same as it had been for years, except by reason of the sale to Waechter Bros. for $125,000 of some Alaskan assets, and thesame of the 'Elihu Thomson' to the Whaling Company for $150,000, was that about right?

A. "At this date.

Q. "So that, the liquidation of the company had not proceeded anywhere except the sale of those two items prior to July 1918?

A. "I think that is true." (Trans., 150–155.)

Q. "Were you present at the meeting that was held immediately after the stockholders' meeting? (In May, 1918.)

A. Yes, sir.

Q. "Who else were on the board, if you remember?

A. "Mr. Stacy, Mr. Miller, Mr. Richardson and Mr. Davis.

Q. "Mr. Seddon? A. Harold Seddon.

Q. "Was Mr. Seddon present at the meeting held immediately after the adjournment of the stockholders' meeting? A. I think he was.

Q. "This was on the 31st of May, 1918?

A. "The 31st of May, 1918.

(Testimony of B. A. Moore.)

Q. "At the trustees' meeting, I will ask you whether you recall Mr. Richardson, discussing the liquidation of the company and his compensation?

A. "I do.

Q. "What was the amount of it?

A. "Five per cent.

Q. "I will ask you whether or not the trustees who were there at that meeting, acquiesced in and approved of it?

A. "I will say so, as I remember it.

Q. "Nobody opposed it? A. No, sir. [181]

Q. Everybody was in favor of it? A. Yes.

Q. Mr. Richardson read the correspondence to you, did he? A. Yes, sir; before the trustees.

Q. And it was approved by them? A. It was.

Q. Now then, later on during the summer of 1918, do you recall when Mr. Richardson—I will ask you whether Mr. Richardson showed you correspondence and telegrams he received from the advisory board accepting his offer to do the liquidation work for 5 per cent? A. Yes.

Q. Was that submitted to you? A. Yes, sir.

Q. Did you attend a meeting of the board of trustees at Mr. Richardson's office about that time?

A. Yes, sir.

Q. Did you attend it on notice? A. Yes.

Q. Were you notified to appear?

A. Notified of the hour.

Q. Do you recall whether Mr. Stacy was there or not, at that time?

(Testimony of B. A. Moore.)

A. Well, in August of 1918, I think it was likely he was.

Q. What is your recollection?

A. I think the meeting would not have been held without his presence.

Q. Who else was there, do you recall?

A. Mr. Stacy, myself, Mr. Richardson and Mr. Davis.

Q. Was Mr. Miller there or do you know?

A. I think not.

Q. Now, at that meeting, I will ask you whether any action was taken, and was it approved or disapproved by the board?

A. It was approved by the board.

He also stated that the reasonableness of the five per cent commission was considered on January 7, 1919, that he thought it was reasonable and the other trustees thought the same. (Trans., 150–161.) [182]

Cross-examination of Mr. MOORE by Mr. FISHBURNE.

Mr. Moore stated there was a meeting in 1918 in which this five per cent was discussed.

Q. Who was present at that meeting?

A. Well, as I say myself, and Mr. Richardson and Mr. Davis, possibly, and Mr. Stacy, as I remember it.

Q. Do you remember the date of the meeting in May, 1918?

A. No, I am sure I do not. I came in as a trus-

(Testimony of B. A. Moore.)

tee May 31, and it is not unlikely it was after that date.

Q. After May 31, 1918? A. Very likely was.

Q. Do you remember whether that meeting was called for the purpose of considering that, or for other purposes?

A. Very likely for that and possibly for other purposes. I imagine; no specific mention made.

Q. Was there any resolution? Was the matter up as a resolution that this should be adopted or was it voted on in any way?

A. Such resolution if made might appear in the record-book.

Q. But if there was no resolution, you say it would probably appear in the record-book if there was a resolution? [183]

A. It might appear. It might appear in the record and it might not appear in the record-book. (Transcript, p. 162.)

Q. Do you know whether there was ever any resolution formally coming before them?

A. The chances are as I remember there was a resolution but as to whether it was spread on the minutes I do not know.

Q. Are you sure there was a resolution made on this occasion? A. I feel very sure there was.

Q. Isn't it a fact that there was some informal discussion and there was no formal resolution adopted?

A. No, I think not. I considered it formal in-

(Testimony of B. A. Moore.)

asmuch as all of the time was given up to it, time that could have been spent in other things.

Q. You do not remember the date of it?

A. As I say, it must have been near the date of the meeting.

Q. It was not in July?

A. No, it was in 1918 but I am not sure of the date.

Q. You do not know the date in 1918? A. No.

Mr. Moore testified that on October 26, 1918, there was sufficient money turned in to take care of the liquidation of all of the checks drawn for the purpose of returning the $500,000, for which checks were given in September, 1918, and that on September 15, 1918, there was enough money to take care of the American stockholders and pay them half of their capital return, and on October 26, 1918, there was enough to take care of the European, the Scotland stockholders. (Transcript, p. 167, Ll. 1 to 13.)

Mr. Fishburne moved to strike testimony of Moore with regard to the discussion as to the five per cent, the date of [184] which Moore could not remember, on the ground that it should be part of the records and minutes of the company and it was incompetent and irrelevant under the rulings of the Court. The Court denied the motion and allowed an exception. (Transcript, p. 167, Ll. 22 to 28.)

Letter of February 9, 1911, Richardson to Inglis, and letter of January 13, 1911, Inglis to Richard-

(Testimony of Eli Moorhous.)

son, were received in evidence and marked as defendant's Exhibit 22–A, and Mr. Fishburne raised the same objection as he had done to the other correspondence between Richardson and Inglis and the advisory board, and the Court allowed him an exception and admitted in evidence said Exhibit 22–A. (Transcript, pp. 168, 169.)

Testimony of Eli Moorhous, for Defendant.

Testimony of ELI MOORHOUS, a witness sworn, testified on behalf of the defendant as follows:

That in his reports the total paid each year for salary and wages to officers and employees was summarized in one item and the two and one-half per cent extra compensation was treated in the same way as the $1,000 a month salary paid Richardson (Transcript, p. 171 bottom, 172 top). He said that the two and one-half per cent extra remuneration first arose in 1912 or thereabouts, when he asked what was the authority for it and Mr. Denman at that time referred him to Mr. Richardson. He took the matter up with Mr. Richardson when he took up other matters arising from the examination and Mr. Richardson showed him the authority from the advisory board at Glasgow for that extra remuneration. He said he did not think he showed him anything in the minutes or tell him anything about the action of the board of trustees. (Transcript, p. 172, Ll. 8 to 18.) [185]

In May, 1919, he said Mr. Denman came into his office in Seattle and also wrote him a letter re-

(Testimony of Eli Moorhous.)

questing him to make mention of these particular commissions in his next report and that so far as he could remember that was the first time his attention had been specifically turned to this two and one-half per cent extra remuneration from the time it first arose in 1912. (Transcript, p. 172, Ll. 2 to 26.) The accountant's report from November 1, 1917, to August 31, 1919, was offered in evidence and was objected to as incompetent, irrelevant and immaterial by Mr. Fishburne and his exceptions were allowed and the said report was admitted in evidence marked Exhibit 23–A. (Transcript, pp. 172, 173.)

On cross-examination Mr. Fishburne said: "Isn't it a fact that Mr. Denman suggested to you in 1912, when this 2½ per cent proposition first came up, that the matter ought to be brought before the trustees and made a matter of record?" And the witness replied: "I do not remember him saying anything to that effect."

Testimony of A. W. Sterrett, for Defendant.

A. W. STERRETT, witness called by the defendant, being duly sworn, testified as follows:

That he was the first man to be employed by the company from its formation until February, 1900, and that he was with them from 1900 until February, 1913, and was trustee of the company at the time the two and one-half per cent commission was added to Mr. Richardson's salary. (Transcript, p. 175, Ll. 6 to 16.) He testified that the

(Testimony of A. W. Sterrett.)

question came up at the last meeting he attended in 1912 "or one of the last meetings and as I remember it, we had some correspondence there from the advisory board in Scotland and it was in answer to some [186] communication or some request that Mr. Richardson had made for an increase of salary, and they offered in lieu of an increase of salary the 2½ per cent commission,—an amount equal to 2½ per cent of the amount of dividends paid to stockholders. He had requested it from them obviously because the letter referred to correspondence from him. I recall it very vividly because we joked a little about it on that occasion." (Transcript, p. 175, Ll. 18 to 30.) He said the question was talked around generally and passed upon by the trustees at the meeting of the Board of Trustees, and to the question: "What action did the board take on it?" he said, "It was approved."

Q. Nobody protested against it?

A. Nobody protested whatever.

Q. Unanimous? A. Unanimous.

To the question whether Mr. Denman, a member of the board at that time, approved it, he said: "He did not disapprove it. There was no protest made from anybody. Yes, Mr. Denman joined with the others in definite approval."

Q. That occurred in 1912?

A. Well, I left the company's employ I think it was February, I am sure it was February, 1913, to go back to Boston, to carry on the work I ac-

(Testimony of A. W. Sterrett.)

cepted there, and I believe I arrived there in March. I cannot remember of having attended any directors' meetings in 1913. I have not looked it up in the record or anything but I remember I was away early in the year, I went away on a little vacation, and left shortly after I came back. (Transcript, pp. 176, 177 top.)

Q. During the time you were on the board of trustees, was the auditor's report taken up at each meeting? [187]

A. Yes, the auditor's reports were always taken up.

Q. I mean by the expert accountant, the certified accountant?

A. Yes, Mr. Moorhous's reports were always brought in.

Q. What about the supplemental report of Mr. Denman, was that taken up at the meetings?

A. That was always attached. I remember seeing the supplemental report.

Q. Were they discussed in the board of trustees' meetings?

A. All of those reports were discussed.

Q. Were they approved by the trustees?

A. Always approved.

Q. Mr. Denman voting for it?

A. Mr. Denman always approved of everything.

Q. This was done at regular meetings of the board?

A. All done at regular meetings. (Transcript p. 177, Ll. 3 to 20.)

(Testimony of A. W. Sterrett.)

On cross-examination he testified:

Q. Now, this resolution that you speak of, do you recall whether it was formally put and resolution adopted?

A. Why, it is usually done that way. I cannot recall the details, I do remember the incident so well because of the canny way the stockholders put it.

To the question: "You know this resolution was put in a formal way, could you swear that was true?" he said, "I believe it was true."

Q. You believe it was? A. Yes.

Q. In the form of a resolution?

A. I particularly remember everything was freely discussed. (Transcript, p. 178, Ll. 1 to 12.)

He said he could not tell why the resolution was not [188] put in the minutes and that he could not recall who was secretary of the company at that time but it was either Mr. Denman or Mr. Albertson, he thought it was Mr. Denman, and to the best of his recollection the trustees present at the time the resolution was adopted were Mr. Davis, Mr. Denman, Mr. Bryant and himself but he could not remember who put the resolution and who seconded it.

Q. You do not remember voting on it at the time?

A. Oh, yes, I remember all these things were approved. (Transcript, pp. 178 bottom, 179 top.)

On recross-examination Mr. Sterrett testified that he was superintendent of the company from its be-

(Testimony of Rufus Davis.)
ginning and all of the time he was connected with the company he was employed by Mr. Rishardson. (Transcript, pp. 179, 180.)

Testimony of Rufus Davis, for Defendant.

RUFUS DAVIS, a witness called by the defendant, being duly sworn, testified in part as follows:

That he was connected with the company from June 1, 1900, to this date. (Transcript, p. 180, L. 25.)

Testimony of L. R. Manning, for Defendant.

L. R. MANNING, a witness called by the defendant, being duly sworn, testified as follows:

That he had lived in Tacoma for thirty-five years and was in the banking business until 1898 and since then had been in the real estate and loan business, and counsel for defendant then asked him the following question:

"Q. Assume that those assets consisted of $1,500,000; that those assets consisted in part of $150,000 Canadian bonds, $50,000 of Canadian script, $64,000 or something like that of liberty bonds, about $96,000 in case, in August, 1918, and that the balance of the assets consisted of [189] about $200,000 in bills receivable, and a lot of personal and real property in the province of Alberta, consisting of farms and farming equipment, 5,000 head of cattle and leases upon which the cattle were grazing, about 250 head of horses and other properties of minor character, but in the aggregate con-

(Testimony of L. R. Manning.)

sisting of about $1,300,000; in cash, bonds, liberty bonds and Canadian bonds, $300,000,—taking those things into consideration, what in your judgment would be a fair compensation to be paid to a man for converting the assets into money, selling off the real estate and personal property, winding up the affairs, and distributing the proceeds to the stockholders, assuming at the same time that the party who agreed to do this would not engage in any other business that would interfere with the liquidation of the company and that he was to pay all attorney's fees except the commissions on the sale of the "Elihu Thomson," a steamboat, and services for a time, of D. A. Moore and R. J. Davis, and that anything beyond a reasonable time on their part should be borne by him out of his individual funds as well as expenses, what in your judgment, under these circumstances, and these assumptions, would you say it would be reasonably worth to liquidate this company?" (Transcript, pp. 181, 182.)

"Mr. FISHBURNE.—I desire to interpose an objection there. I object on the ground that it is incompetent, irrelevant and immaterial, because what was the reasonable value of these services would not be admissible under the law, and on the further ground that it is not proper expert testimony. The jury is just as capable of passing on this as the witness himself. It is relative to a time, part of [190] which the defendant was under salary. We object on the further ground that it is

(Testimony of L. R. Manning.)

inconsistent with their contention that he was authorized by a resolution.

Mr. McCORD.—And assuming further that the party who was to do this liquidation and sell these assets was also drawing a salary of $12,000 during the summer of 1918 and up to September 30, 1918. With that modification, I will renew the question.

Mr. FISHBURNE.—I will renew the objection.

The COURT.—Yes, let the same objection to the question as modified and the objection will be overruled and exception noted.

Q. Now, go ahead.

A. I should think 10 per cent would be a reasonable commission. (Transcript, pp. 181, 182, 183.)

Testimony of Chester Thorne, for Defendant.

CHESTER THORNE, witness called by the defendant, being duly sworn, testified as follows:

That he lived in Tacoma since 1890 and had been engaged principally in the banking business, first with the National Bank of Commerce and now with the National Bank of Tacoma, its successor, and that he was president of the board and Mr. McCord asked him the same question as he asked Mr. Manning and Mr. Fishburne interposed the same objection as he had made to the former question and the Court overruled his objection and allowed him an exception. The witness answered that he thought ten per cent would be very reasonable compensation for Mr. Richardson's services, that is ten per cent of $1,300,000. (Transcript, pp. 184, 185.)

Testimony of Eugene Wilson, for Defendant.

EUGENE WILSON, a witness called by the defendant, being [191] duly sworn, testified as follows:

That he has been engaged in the banking business in Tacoma for the last twelve years, first with the Bank of Commerce and then with the National Bank of Tacoma as vice-president, and that he was vice-president now. Mr. McCord propounded to him the same question he had asked Mr. Manning, Mr. Fishburne interposed the same objection and the Court allowed him an exception. Mr. Wilson said he was thoroughly familiar with all the work connected with the liquidation of the Pacific Cold Storage Company and he thought from eight to ten per cent would be reasonable for it. (Transcript, pp. 185, 186, 187.)

On cross-examination Mr. Wilson testified that Mr. Richardson was one of the trustees or directors of the National Bank of Tacoma and had been a director long before Mr. Wilson came there and still was a director. (Transcript, p. 187 bottom.)

Testimony of Rufus Davis, for Defendant (Recalled).

RUFUS DAVIS then resumed his testimony and among other things testified as follows:

That he closed the Alberta negotiations (Transcript, pp. 189, 190 top), and that everything he did from the date he was employed to this date by

(Testimony of Rufus Davis.)

the Pacific Cold Storage Company was under instructions of the president, Mr. Richardson.

Q. Did Mr. Richardson take any active concern in the disposition of these assets in Alberta?

A. He did, just as he had in the whole of the business from its inception.

Q. In other words, Mr. Richardson dominated anything he came in contact with, did he?

A. Well, if you want to express it that way. I would say Mr. Richardson took an active interest in all the business of [192] the Pacific Cold Storage Company, that he discussed the affairs of the Pacific Cold Storage Company, and after getting all the information he could from employees and other sources, he decided what was best to do, and Mr. Richardson's judgment finally controlled the policies of the company in the last analysis.

Counsel asked the question: "Does that apply in the disposition of the assets as well as in the previous management of the company?" and the witness said: "Yes." (Transcript, p. 190.)

The witness testified that the head office of the Pacific Cold Storage Company was at Tacoma, Washington, and that it had branches at Fairbanks, Nome, Fort Gibbon, Dawson, Ruby, St. Michael, Iditarod, Gleichen and Glasgow office, 26 Bothwell Street.

The witness further testified that he went to Alberta for the purposes of carrying out Mr. Richardson's instructions to dispose of that property first in 1917 and under his instructions made some pro-

(Testimony of Rufus Davis.)

gress. "In June, 1918, I again went to Alberta, where I can say that the principal part of the disposition of the assets took place." He testified that the various properties in Alberta were sold in 1917 and on or before August, 1918, but that the purchase price of these assets were not cash at the time the sales were made and were not for many months thereafter (Transcript, pp. 192, 193, 194, 195). Referring to the balances due for the Alberta property, counsel for defendant said:

Q. Were those accounts what you would call bankable paper which would be readily discounted or which you would have to work off the best you could, and to sell the securities?

A. I do not think you could sell that paper to a commercial [193] house, no, but you had to find customers for it.

Q. It was not bankable paper, was it?

A. No, I do not think it was. If I remember, we circulized our shareholders. They were all interested in getting this property into cash, and I am sure some of them were connected with banks and none of them ever said their banks would take the paper.

Q. Did you know about the Waechter notes? Did you consider those bankable paper or did you not?

A. I suppose the Waechter notes were good papers or we would not have taken them.

Q. What is that?

(Testimony of Rufus Davis.)

A. I supposed the Waechter notes were good and would at some time be paid or we would not have taken them, but I do not think I could have taken them to any bank in the State of Washington.

Q. Could not negotiate it at the bank?

A. I do not think I could have done so. (Transcript, pp. 195, 196.)

Q. Knowing the value of those assets as you did, what do you consider as to liquidation and sale, was it a good liquidation and sale, or was it a poor one?

Mr. Fishburne objected to the question as incompetent, irrelevant and immaterial and the Court allowed the witness to answer and he said, "I think it was an exceedingly good liquidation." (Transcript, p. 196 bottom.) He said he was a trustee in 1912 and that he could not say whether the correspondence between the advisory board and Mr. Richardson relative to increase of salary to Richardson was admitted to the board at any regular meeting at which he was present. (Transcript, p. 197.) [194]

Q. Do you recall whether the board ever adopted or approved at any regular meeting, this arrangement with Mr. Richardson as to the 2½ per cent commission?

A. I could not say whether there was any formal action on that proposition or not.

Q. Do you know whether it was brought up at any meetings of the trustees and discussed?

(Testimony of Rufus Davis.)

A. Well, the reports containing the statements were brought up annually and discussed.

The witness further said that the board approved the reports as submitted.

Q. That is you refer now to the accountant's report, Denman's supplemental report? A. Yes.

Q. What do you recall about whether any formal resolution was introduced or not, or was the matter brought up and discussed and the understanding was that it was agreeable, something of that sort,—how was that, do you recall?

A. I know that under some circumstances a resolution was offered to that effect and seconded and voted upon.

Q. By Mr. Denman, wasn't it, in one instance?

A. Yes. Well, I did not know about that. We had here in the minutes yesterday, one instance where I made a motion and Mr. Denman seconded the motion. (Transcript, pp. 199, 200 top.)

Counsel referring to the meeting of the stockholders of May 31, 1918, said: "Now, after that meeting (meaning the stockholders' meeting) were any resolutions introduced that you remember, agreeing with and authorizing the payment of this commission of five per cent to Mr. Richardson?"

A. I do not know, I cannot recall. [195]

Q. Was the matter discussed at that meeting?

A. Yes, it was discussed at that meeting.

Q. And at that meeting was there any disapproval of it or any approval of it one way or the other,—just what your recollection is?

(Testimony of Rufus Davis.)

A. Well, that matter was up several times and I do not remember any disapproval of it.

Q. You do not recollect whether there was a formal resolution introduced at that time or not?

A. No, I do not.

Mr. Fishburne moved to strike all the testimony relating to the five per cent commission on the ground that it was not proper under the ruling and law relative to how trustees shall perform their duties or make a contract of that sort, and the Court overruled the objection, and the witness then testified that the matter as to the five per cent commission was drawn to the board of trustees at that time "and my recollection is that no action was taken, because even as late as 1918 we did not care for advertising the fact that we were converting the assets of the company into cash and expected to retire from the business."

Q. That is, no written action was taken?

A. No.

Q. Well, was there any action taken in the way of a passage of a resolution and not spread upon the minutes any action,—it does not have to be spread upon the minutes to be a valid action,—but I want to know whether the board acted upon this matter and approved the payment of the 5 per cent commission to Mr. Richardson?

A. I could not say just exactly what action was taken but it [196] was understood that was my,—

At this point Mr. Fishburne moved that what he

(Testimony of Rufus Davis.)

understood be stricken and it was so ordered by the Court.

Q. Why do you say it was understood if it was not. Just go ahead and tell what was done in reference to the approval of this suggestion that Mr. Richardson be paid five per cent.

A. I recall that the matter was discussed at that time and agreed to and I think I know too why it was not put on the minutes, and I do not want to swear to that, I cannot recall that.

Q. You know that action was taken but you would not swear why it was not put on the minutes?

A. No. (Transcript, pp. 202, 203.)

He said he voted for the five per cent commission and to the question whether he considered that sum reasonable Mr. Fishburne objected as incompetent, irrelevant and immaterial on the grounds already stated and the Court overruled the objection and allowed him an exception, and the witness then answered that he considered the compensation reasonable or he would not have voted for it. (Transcript, p. 204.)

The witness RUFUS DAVIS testified that he was connected with the Pacific Cold Storage Company during its entire existence, from June 1, 1900, to the present time, occupying various positions as branch manager at Dawson, to vice-president. (Trans. 180.)

Q. What did the company finally have in Alberta?

A. They had two ranches that they owned in fee simple and a lease on Government land for pasture

(Testimony of Rufus Davis.)

purposes. They had 5,000 head of cattle approximately, 250 50 300 head of horses. They had [197] branch markets at Gleichen, Benalto and Brooks and were engaged in a general farming and marketing business supplying from Alberta, the branches at Dawson and at times all the other northern branches of the company. At the beginning of the war, when the cry came for wheat for the world, they branched out into a wheat farm, and the first year they raised 15,000 bushels of wheat and the next year about 20,000 bushels of wheat and continued their livestock business, until under instructions to turn the assets of the company into cash, we were instructed to sell and finally did sell, all of their property in that province.

Q. "Were you there when the properties were sold? A. I was.

Q. "You closed the negotiations, did you?

A. "I did.

Q. "I will ask you under whose instructions you liquidated or sold those assets?

A. "Everything I did from the date I was employed to this date, by the Pacific Cold Storage Company, was under instructions of the president, Mr. Richardson.

Q. "Did Mr. Richardson take any active concern in the disposition of these assets in Alberta?

A. "He did, just as he had in the whole business from its inception.

(Testimony of Rufus Davis.)

Q. "In other words, Mr. Richardson dominated anything he came in contact with, did he?

A. "Well, if you want to express it that way.

Q. "Well, how would you express it?

A. "Well, I would say that Mr. Richardson took an active interest in all of the business of the Pacific Cold Storage Company, that he discussed the affairs of the Pacific Cold Storage Company, and after getting all the information he could from employees and other sources, he decided what was best to do.

Q. "And whose judgment finally controlled the policies of the company? A. Mr. Richardson's. [198]

Q. "In the last analysis?

A. "Mr. Richardson.

Q. "Always,—I mean by that, does that apply in the disposition of the assets as well as in the previous management of the company?

A. "Why, yes.

Q. "Where did this company have offices?

A. "The head office of the Pacific Cold Storage Company was at Tacoma, Washington. There were branch offices at Dawson, Fairbanks, Ruby, Iditerod, St. Michaels, Nome, Gleichen and an office in Glasgow, Scotland.

Q. "Now, when did you go, if at all, to Alberta, for the purpose of carrying out Mr. Richardson's instructions to dispose of that property?

A. "I went first to Alberta in 1917 for that purpose, and under his instructions made some progress. In June, 1918, I again went to Alberta

(Testimony of Rufus Davis.)

where I can say that the principal part of the disposition of the assets took place.

Q. "Were they sold out in 1918, all of the assets in Alberta? A. In 1918?

Q. "Yes.

A. "No, not all of the assets in Alberta in 1918.

Q. "What was sold in 1918 and what later?

A. "Well, in the conversion of property into cash, there are sometimes more than one step to be taken. You can sell it for cash, or you can sell it for part cash and part notes or other collateral, or on even a straight book account. Now the South ranch, as it was termed, in Alberta, was sold to Chris Bartsch.

Q. "What was sold?

A. "In 1917 the equipment of that ranch was sold for the sum of $60,000, but we did not get $60,000 in cash. I cannot perhaps detail all the arrangement but we got some cash at that time, [199] and some cash, I think $10,000 was to be paid in 1918, and the balance of $30,000 was to be placed on mortgage and $10,000 of that was to be paid in about a year, and the balance in, if I remember, ten equal annual payments. Now, it became necessary to dispose of that mortgage and that mortgage we did not succeed in converting into cash until 1919. Now, we sold the North ranch and some cattle and some horses, some equipment and other livestock to John C. Norton."

That later on other trades were made and finally the property was sold, part for cash and part by

(Testimony of Rufus Davis.)

mortgage running for a period of five years. (Trans. 193.)

Q. "Then the divers payments on the sale of those assets in Alberta were not cash at the time the sales were made, and were not for many months thereafter, were they?

A. "Just as I stated. [200]

Q. "That is true of the Bartsch notes, too, wasn't it?

A. "The Bartsch paper would not be bankable paper at all.

Q. "Now, did you have anything to do with the disposition of any other property in the liquidation process so far as you recall?

A. "No, except perhaps to assist in the sale of this property here in Tacoma.

Q. "That was sold to whom?

A. "Mr. Richardson sold that to Mr. Huck of the North Pacific Sea Products Company.

Q. "Knowing the value of those assets as you did, what do you consider as to the liquidation and sale, was it a good liquidation and sale, or was it a poor one?"

Mr. Fishburne objected to the question as incompetent, irrelevant and immaterial.

A. "Well, I may be prejudiced, but of course I think that,—it was an exceedingly good liquidation. I do not think there had been a day since we started on that liquidation we could have gotten as much money for the assets as we got at that time. I think there was both energy and brains

(Testimony of Rufus Davis.)

put into it, and that in addition to that, there was considerable good fortune coming our way.

Q. "Well, what have you to say as to Mr. Richardson's connection with it?

A. "He put his time and usual energy into the matter of liquidating the assets, and did his work as speedily as possible and got every cent there was in it.

Q. "The time at which it was sold was a fortunate item? A. I think so.

Q. "And who selected that time?

A. "I think Mr. Richardson did.

Q. "Now were you a trustee of the Pacific Cold Storage Company? A. I was for a time.

Q. "How long a time?

A. "I do not know when I first was elected as a trustee, but it runs back as far as 1910." [201]

Q. Do you recall the correspondence between the advisory board and Mr. Richardson relative to the increase of salary to Richardson?

A. I know there was such correspondence.

Q. Was that correspondence admitted to the board at any regular meeting at which you were present?

A. I could not say whether the correspondence itself was or not.

Q. Well, was the substance of it brought before the board meeting to your recollection of the matter?

A. My recollection is Mr. Denman first mentioned to me the matter of the additional compensation to

(Testimony of Rufus Davis.)

Mr. Richardson in 1911 or '12 and he showed me at that time how he intended to set that out in his supplemental report, and everybody knew all about the matter. I cannot recall now any particulars as to just what was said and done, but I know that the compensation was set out in the supplementary report or supplemental report at that time, and that Mr. Bryant, who was a director, and Mr. Cox —I do not know whether Mr. Cox was a director at that time or not, but he was just as familiar with the affairs of the company as he was afterwards when he was a director, and Mr. Denman and I and Mr. Richardson and Mr. Sterrett all knew exactly on what basis Mr. Richardson drew salary including this 2½ per cent. For myself it was my habit to go over these annual reports very carefully and I frequently discussed the matter of the 2½ per cent compensation with Mr. Denman, who was the auditor of the company at that time, and he never made any objection to it.

Q. Do you recall whether the board ever adopted or approved at any regular meeting, this arrangement with Mr. Richardson as to his 2½ per cent commission?

A. I could not say whether there was any formal action on that proposition or not.

Q. Do you know whether it was brought up at any meetings of the trustees and discussed?

A. Well, the reports containing the statements were brought up annually and discussed.

(Testimony of Rufus Davis.)

Q. What action did the board take on them annually?

A. They approved the reports as submitted.

Q. That is you refer now to the accountant's report? Denman's supplemental report? [202]

A. "Yes.

Q. "Those different accounts year by year were approved by the directors? A. Yes.

Q. "At regular meetings? A. Yes.

Q. "What do you recall about whether any formal resolution was introduced or not, or was the matter brought up and discussed and the understanding was that it was agreeable, something of that sort,—how was that, do you recall?

A. "I know that under some circumstances a resolution was offered to that effect and seconded and voted upon.

Q. "By Mr. Denman, wasn't it, in one instance?

A. "Yes, well, I did not know about that. We had here in the minutes yesterday, one instance where I made a motion and Mr. Denman seconded the motion.

Q. "That is, approving the payments?

A. "To approve the report as submitted, the annual report.

Q. "The annual reports did not show payment to Mr. Richardson of his salary, did they?

A. "Surely.

Q. "And that was approved each year?

A. "Yes, sir.

(Testimony of Rufus Davis.)

Q. "I mean each year at a meeting of the trustees as well as stockholders?

A. "Of the trustees, yes.

Q. "Sometimes by the stockholders, too, wasn't, or do you recall?

A. "No, I do not know positively as to that. We usually had a short stockholders' meeting and then immediately afterwards we had the trustees' meetings.

Q. "Run them right close together?

A. "Well, not even a five minutes recess. [203]

Q. "Did you attend the stockholders' meeting of May 31, 1918? A. I did.

Q. "Were you elected a trustee at that time?

A. "I was.

Q. "Did you qualify immediately afterwards?

A. "Yes.

Q. "You held your meeting that year just after the adjournment of the stockholders' meeting?

A. "Yes.

Q. "I will ask you whether at that time there was brought before the board, this proposition of Richardson to liquidate the company and receive the compensation of five per cent for doing so, do you recall that? A. Yes.

Q. "You recall attending that meeting?

A. "Yes.

Q. "Who was present?

A. "Charles Richardson, Ralph Stacy, F. L. Denman—

Q. "Who?

(Testimony of Rufus Davis.)

A. "I think F. L. Denman was there.

Q. "He was not a trustee?

A. "1918, wasn't this?

Q. "Yes.

A. "I think he was at the shareholders' meeting May 31, 1918.

Q. "Well, whether he was a director or not makes no difference. Who else was there? Was Mr. Miller there?

A. "Mr. Miller was there, I am pretty sure Mr. Miller was there at the stockholders' meeting in 1918 and I presume he was at the directors' meeting. I would not want to swear to that.

Q. "Was Mr. Moore there?

A. "B. A. Moore was there, yes, B. A. Moore was there.

Q. "Now, after that meeting, were any resolutions introduced that you remember, agreeing with and authorizing the payment [204] of this commission of five per cent to Mr. Richardson?

A. I do not know, I cannot recall.

Q. Was the matter discussed at that meeting?

A. Yes, it was discussed at that meeting.

Q. And at that meeting was there any disapproval of it or any approval of it one way or the other,—just what is your recollection?

A. Well that matter was up several times and I do not remember any disapproval of it.

Q. You do not recollect whether there was a formal resolution introduced at that time or not?

A. No, I do not.

(Testimony of Rufus Davis.)

Q. But it was the consensus of the meeting as expressed by them that it was satisfactory?

Mr. FISHBURNE.—We object to that as incompetent, irrelevant and immaterial, move to strike all the testimony relative to it on the ground it is not proper under the ruling and law relative to how trustees shall perform their duties or make a contract of that sort.

The COURT.—Objection overruled. Question is what was done at that time.

Q. Go ahead and tell what was done.

A. The matter was drawn to the board of trustees at that time and my recollection is that no action was taken, because even as late as 1918 we did not care for advertising the fact that we were converting the assets of the company into cash and expected to retire from business.

Q. That is no written action was taken?

A. No.

Q. Well, was there any action taken in the way of a passage of a resolution and not spread upon the minutes any action,—it does not have to be spread upon the minutes to be a valid action, but I want to know whether the board acted upon this matter and approved the payment of the 5 per cent commission to Mr. Richardson.

A. I could not say just exactly what action was taken, but it was understood—

Mr. FISHBURNE.—Now may it please the Court I move that what he understood be stricken.

(Testimony of Rufus Davis.)

The COURT.—Yes, what he understood will be stricken.

Q. Why do you say it was understood if it was not. Just go ahead and tell what was done in reference to the approval of this suggestion that Mr. Richardson be paid five per cent. [205]

A. I recall that the matter was discussed at that time and agreed to, and I think I know too, why it was not put on the minutes and I do not want to swear to that, I cannot recall that.

Q. You know what action was taken but you would not swear why it was not put on the minutes?

A. No.

The witness stated that shortly after this meeting he went to Dawson, Alaska, or Alberta and returned in December and was present at the meeting on January 7, 1919. (Trans. 186–199.)

Testimony of Ralph F. Stacy, for Defendant.

RALPH F. STACY, a witness called by the defendant, testified in part as follows:

That he for seven years and seven months was president of the National Bank of Tacoma in Tacoma, Washington, and knew Mr. Richardson. Mr. McCord asked what in his judgment was the service worth at that time for winding up the Pacific Cold Storage Company and whether five per cent was reasonable or unreasonable, and Mr. Fishburne made the same objection as to the question to Mr. Manning, the Court made the same ruling and allowed him an exception, and the witness stated that

(Testimony of Ralph F. Stacy.)

he voted for the resolution because he thought the five per cent was reasonable. (Transcript, pp. 205–207.)

Q. You recall the telegram from Inglis approving the proposition of paying Richardson five per cent? A. I do. [206]

Q. That you knew of, did you, prior to the meeting in January?

A. I will not say how long, but some weeks at least.

Q. You do not recall whether after the receipt of the telegram by Mr. Richardson along about the middle of August, 1918, whether you had a meeting or not? A. No, I do not. (Transcript, p. 208.)

Ralph S. Stacy testified that he was one of the trustees of the Pacific Cold Storage Company in 1918 and was one of the trustees upon the dissolution of the company, that he voted for the resolution of January 7, 1919, approving the payment of five per cent commission to Mr. Richardson. He states, over the objection made by Mr. Fishburne and exception allowed by the Court:

I voted for it because I thought it was reasonable and I thought it was reasonable for two distinct reasons. I had been for many years up to then and since, familiar with the liquidating of various concerns. Any concern that can pay all of its debts and pay over 100 per cent on the dollar, is certainly worth five per cent to liquidate. Furthermore, I had personal reasons for thinking it was all right. I had some stock which I bought in

(Testimony of Ralph F. Stacy.)

1915 at 72 cents on the dollar. That stock eventually brought me 105, approximately $33 per share, almost fifty per cent. In addition it has brought me regularly dividends for three years of ten per cent or more. Any man that will pay me fifty per cent in that length of time is certainly entitled to five per cent. Those are the two reasons why I voted for that resolution at that time.

Q. Thought it was worth it?

A. I thought it was worth it and I was glad to do it.

The witness stated that he was familiar with [207] Mr. Richardson in Tacoma and was the President of the National Bank of Tacoma and that his office was in the same building in 1918, as the office of the Pacific Cold Storage Company.

Q. "During the summer of 1918, and prior to this time in January, 1919, I will ask you whether you recall ever attending meetings, without fixing the time?

A. "I know I attended some, but I do not know how many.

Q. "You know you attended some?

A. "Yes.

Q. "Now, I will ask you at the time you attended these other meetings, you had heard of this correspondence between Richardson and the advisory board in reference to the settlement? A. Yes.

A. "I had heard of it, it was talked over.

Q. "You talked it over? A. Yes.

Q. "You recall the telegram from Inglis approv-

(Testimony of Ralph F. Stacy.)

ing the proposition of paying Richardson five per cent? A. I do.

Q. "That you knew of, did you, prior to the meeting in January?

A. "I will not say how long, but some weeks at least.

Q. "You do not recall whether after the receipt of the telegram by Mr. Richardson, along about the middle of August, 1918, whether you had a meeting or not? A. No, I do not.

Q. "You did have some meetings?

A. "We had met at regular intervals at the call of the president, and this particular matter was discussed by the directors.

Q. "Was discussed? A. Yes.

Q. "Do you recall what action was taken on it?

A. "I do not know whether there was any formal action or not, I know that no director present objection. [208]

Q. "What is that?

A. "No director presented objection. Like myself, they thought it was reasonable.

Q. "And all of them expressed themselves as favorable to it? A. Yes.

Q. "And that was before this formal resolution was entered on the books in January?

A. "Oh, yes.

Q. "Some time before? You cannot tell when?

A. "Some time but I cannot tell how long.

Q. As a matter of fact, at the meetings, whatever the date, before this formal meeting was held,

(Testimony of Ralph F. Stacy.)
the matter was discussed and everybody signified their approval of the plan, did they?

A. "To the best of my recollection, yes, sir."

On cross-examination the witness stated:

Q. "Isn't it a fact that, in the summer of 1920 you stated to Mr. Denman that you had never heard of this 5 per cent?

A. "It is absolutely not a fact." (Trans. 205–210.) [209]

Instructions of Court to the Jury.

Gentlemen of the Jury:

The plaintiff alleges in four different causes of action that the defendant is indebted to him in the sum of money which is set out in the seventh amended complaint. The pleadings are the seventh amended complaint and the amended answer, which will be sent to the jury-room. They are not to be considered as evidence in the case. You can read the pleadings to determine what is the claim on the part of the plaintiff and what is the claim of the defendant.

The plaintiff sets forth four claims; and you are instructed that where an admission is made by the answer no proof needs to be presented to establish that fact by the plaintiff, and where a denial is made the fact must be found from the evidence which is presented, and where the defendant says he has neither knowledge nor information on which to form a belief as to the allegations of the com-

plaint that under the law of this state amounts to a denial.

I will state to you briefly what the claims are. The plaintiff claims that in 1897, the Pacific Cold Storage Company was a corporation doing business in Tacoma; that it ceased to do business on the 31st of May, 1918, and was dissolved and order entered June 2, 1919; and that before the order of dissolution was entered all of its debts were paid; that the corporation had capital stock of a million dollars divided into ten thousand shares of one hundred dollars each [210] and that plaintiff was the owner of 60 shares; that during the life of the corporation it made profits and dividends were declared in such sums as were proper; that the defendant between the years 1912 and 1918 while acting as trustee and president, without authority, wrongfully appropriated from the earnings of the company $18,000; that the total dividends earned during that time was $720,000; that the plaintiff was entitled out of those earnings or profits to $108.00 on his 60 shares of stock; that he has asked the defendant to pay the same, which the defendant has refused.

In the second cause of action he says one Charles A. Miller owned 798 shares of stock of this corporation, and sets out the same allegation in relation to the Miller stock as he did in relation to his own, and says that there accrued to the Miller stock $1,436.40 on account of this two and a half per cent; that since the commencement of this action Miller sold to the plaintiff all of his shares of

stock. He sets out the dates of ownership and the value of the shares of Miller and then says demand was made on defendant for the amount named, which has been refused.

The third cause of action sets forth the same facts in relation to the organization, stock ownership and capital stock, and says that upon the dissolution of the corporation of the capital stock return the defendant Charles Richardson appropriated certain sums of money, and of that particular appropriation made of the capital stock return, the amount due to the plaintiff for his 60 shares was $315.00, and that the amount due upon the capital return of the Miller stock taken by [211] the defendant was something over $4,000, and that the total amount which he is claiming judgment is $6048.90, with interest at six per cent per annum on $1544.40 from the 31st day of May, 1918, and on $4504.50 from the 31st of January, 1920.

Defendant answering the allegations of plaintiff admits it was a corporation doing business in Tacoma, had a capital stock of $1,000,000; admits the plaintiff was the owner of 60 shares of the capital stock and also admits the defendant was trustee and president of the corporation; admits that dividends were declared of approximately $720,000, admits that he refused to pay plaintiff the sum of $108.00; admits that Miller owned 798 shares of the capital stock of said corporation; admits the order of dissolution was entered on the 7th of June, and denies every other allegation in the several counts in the complaint.

Defendant then further answers and says that a large number, more than 90 per cent of the capital stock of the corporation was held by residents of Great Britian long prior to June 1, 1911, and to the date of the dissolution, and that those stockholders in Great Britian appointed among themselves an advisory committee to determine the policy and business management of the corporation, and that this advisory committee was approved by the board of trustees and stockholders at annual meetings held in the City of Tacoma; that this advisory committee was by consent of each and all of the stockholders verbally clothed with power to determine the policy subject to be approved by the board of trustees, and that such action by the board of trustees was taken at [212] the annual meeting of the stockholders and at the first meeting of the board of trustees after each stockholders' meeting, but that those proceedings were not recorded in the minutes; that the defendant as *present* of the board of trustees had communicated with the advisory board through correspondence which has been submitted to the plaintiff; that from the year 1901 until the date of dissolution the defendant was president and member of the board of trustees and had active charge and management of the corporation and performed the duties prescribed by the by-laws; that prior to January 1, 1911, he received a salary of $1,000.00 a month; that on or about the 14th day of December, 1910, he communicated with the advisory committee on the question of additional compensation and the advisory

committee agreed that he should receive 2½ per cent of the total amount of dividends paid by the corporation each year; that he accepted this proposal and that this proposal was submitted to the board of trustees and was by the board of trustees at their several annual meetings approved, but no minutes appeared upon the minute-book, but such resolution was adopted by the unanimous vote of the trustees at such meetings verbally; that this arrangement continued from January 1, 1911 to December 31, 1917, and that this 2½ per cent of dividends declared was paid to the defendant when the dividends were paid to the stockholders; that all dividends declared by the corporation were paid by the corporation to the shareholders, and that the 2½ per cent was deducted from the gross earnings of the corporation and not from any of the declared dividends of the stockholders; that at the time that the arrangements for this additional compensation was made and all [213] of the time from the 1st day of June, 1910, to the 1st day of June, 1918, the plaintiff was secretary and auditor of the corporation and made all vouchers explanatory of all disbursements; that the explanation upon the vouchers for such additional compensation was: "Extra on 2½ per cent of total dividend as per order on file"; that each year the account books of the corporation were audited and a report of such audit was made and that in such audits so annually made the 2½ per cent additional compensation was included and explained; that such audits were submitted to the advisory board

and to the annual meeting of the board of trustees and were approved by the board of trustees, and that checks were drawn by the corporation in payment of such additional compensation; that during a portion of the time the plaintiff was a trustee; that on January 13, 1912, the defendant wrote a letter to the plaintiff as auditor of the corporation saying that by virtue of a resolution passed by the advisory board he was given 2½ per cent on account of all dividends additional to salary; that checks would be issued for this amount, and that each year thereafter the plaintiff issued checks to the defendant for the several amounts where are set out in that count; that these amounts were entered in the annual reports, and that these payments were pursuant to authority and approval of the trustees. And defendant further says about two years prior to the 31st of May, 1918, he submitted to the advisory board a suggestion for liquidating the corporation and suggested to them the advisability of paying to the defendant a commission for services in liquidating the corporation instead of a salary and it was agreed that he should receive five per cent of the liquidated assets of the corporation, and [214] this was approved by the board of trustees and stockholders; and that he entered upon the discharge of his duty and carried it out under the direction of the advisory board and the board of trustees of the corporation and made a total distribution of $1,050,000 to the stockholders, and that his compensation for the service was allowed by the advisory committee and board of trustees of

the corporation and that the payment of such compensation was subsequently ratified by the board of trustees and the stockholders. Defendant further answers that the services which he rendered were outside the scope of his duties as president and trustee, and that the amounts which were paid to him were the reasonable value of the services rendered; and that the plaintiff, by reason of what he did and by reason of the acts of Miller with relation to the conduct of the business and his succeeding to the Miller stock, is estopped from contending that the compensation paid to the defendant under the circumstances was unauthorized; and further says that all the amounts claimed by the claimant on the first cause of action, except as to the payments in January, 1917, and 1918, are barred by the statute of limitations and cannot be recovered; and further says that any recovery sought for anything due on the Miller stock cannot be allowed, he having seconded the motion to allow the five per cent commission and having voted in favor of it.

You are instructed, gentlemen of the jury, that the plaintiff has filed a reply in which he denies the affirmative matter set forth in the answer of the defendant. [215]

You are instructed that the burden of proof in this case rests upon the plaintiff to establish the facts set forth which are denied; then the burden shifts to the defendant to show the facts as are contended for by him in his answer, and this must be done by a fair preponderance of the evidence.

By fair preponderance I do not mean the greater number of witnesses testifying to any fact or state of facts, but the greater weight of testimony. The testimony of one witness sometimes outweighs the testimony of many witnesses. In considering the weight of the testimony of the witnesses who appeared before you, you will take into consideration the documents and exhibits that have been presented, the documentary evidence,—reports and letters and all of the memoranda which the court permitted to be read to you and which has been filed, and lots that have not been read; and you will consider fairly this entire issue. You are the sole judges of the facts and you must determine what they are. Give each of these parties a square deal and concentrate your minds solely upon this issue here eliminating everything else. You are likewise the sole judges of the credibility of the witnesses, and in determining the weight and credit that will attach to the testimony of any witness you will take into consideration his demeanor upon the stand, the fairness of his testimony, his interest or lack of interest in the result of this controversy, the reasonableness of his story, and from all the circumstances surrounding the case, determine where the weight of the evidence is, and if you believe any witness has wilfully testified falsely to any material fact [216] in this case you will disregard the testimony of that witness entirely except in so far as it may be corroborated by other credible evidence or circumstances developed upon the trial of the case. In determining the testimony

in this case and the fact which is in issue here, if it is apparent or may be apparent to you in the trial of this case that there was any witness who was available who knows about the facts and who was not called to be a witness by the party who contended his testimony to be in his favor, you would have a right to conclude that the testimony of that witness, if he had not been called, would be against the party who should have called him, if he was available.

You are instructed as a general proposition of law when by-laws are adopted by a corporation that the conduct of the business of the corporation should be in accordance with the by-laws, and when the by-laws provide that compensation shall be fixed by the board of trustees then no compensation can be fixed except as is provided by the by-laws. This provision of the by-laws and of the law is for the purpose of protecting creditors and stockholders without notice. A stockholder has always the privilege of inspection of the books and records of the corporation, and the provision is so that the stockholder knows upon examination of the records that they disclose exactly what the status of the corporation is and that the creditor of the corporation likewise may be advised as to what the expenses of the corporation are. This iron-clad proposition, however, with relation to by-laws and fixing compensation is not construed in the same strict manner with stockholders who have notice The purpose of the by-laws [217] and purpose of the minutes is to give notice to everybody who

is entitled to it, and when a stockholder has notice of the business of the corporation then he is fully advised just the same as though the record had been made. I advise you in relation to that fact in view of what has been said in the argument and in the admissions of the testimony here, so that you will be advised fully, more fully with relation to the status of the several parties in this case.

Likewise, gentlemen of the jury, as I have heretofore held, as in the law, the stockholders of a corporation have a right to expect from their directors a conscientious consideration of every proposition which is presented, and which involves any interest of the company, and such consideration must be given and action taken in formal meetings. The directors have no power to act as such individually, nor can they delegate the powers vested in them to act for the corporation to any officers or men, even though they are the majority stockholders.

That is a general proposition of law. A board of directors has responsible duties and functions to perform, that is, to attend to the business of the corporation. It is perfectly proper for a board of directors to receive advice and suggestions from a committee of stockholders. A majority of stockholdersalways determine the policy of the corporation. A majority of the stockholders control the corporation through its board of directors, and when the stockholders living at a distance or foreign stockholders, if they are interested in the corporation here and if they own [218] the majority of the stock, want to participate in the

management of the corporation, it is perfectly proper for them to meet and appoint a committee among themselves to look after the affairs and the details of the corporation, and to submit their findings and their conclusions to the corporation. It would not be proper for the corporation to turn over its control to that committee, but it is proper for the corporation to receive suggestions and reports from this advisory committee and then act upon the matter independently themselves as a board. You are instructed that when they do this it is perfectly proper. They have complied with the law. They still discharge their duties and functions as members of the board, because the final conclusion is theirs and their judgment is exercised and they either approve or disapprove of the suggestion of the advisory board.

Now, in this case as I have already told you, count 4 is withdrawn from your consideration, a motion to dismiss has been granted. That is where the plaintiff seeks to recover on the 5 per cent commissions on the distributions made of the capital return by the defendant, and you are not concerned with that. Mr. Miller, owner of the stock, seconded the resolution and voted for it, and that estops him from claiming the compensation was either not authorized or was not reasonable, because the defendant entered upon the discharge of his duty under the resolution and it became a contract as between the defendant and all the stockholders or members of the board who were a party to it. So Miller cannot recover for that, and the plaintiff knew of it and

he succeeded to that stock and he may not recover for that. [219]

The Court likewise eliminated from your consideration all the claims for the 2½ per cent commission for the years 1912, 1913, 1914, 1915 and 1916, and the 1918 commission after that, and that was within the period of three years. The statute of limitations is three years. In order to have a right of action a party must assert a claim within the period of limitation, which is three years in this state.

Now, the defendant says the plaintiff ought not to recover for that for the reason that long prior to that time there was an agreement between the board of directors and stockholders, upon the suggestion and understanding between him and the advisory committee of the majority stockholders, which the testimony shows here is from sixty-five to eighty or eighty-five per cent,—I do not remember; you will remember about that—and the plaintiff admits that he knew of this. He at the time was auditor and continued to be auditor for many years, and secretary for a time. He knew of the payment of the 2½ per cent every year it was paid; so that he was fully advised, just as fully as though a minute had been made or a formal resolution had been given and placed upon the minutes. There is testimony here that the board of trustees knew about this and there is testimony here that this was made in the annual report by the audit committee, being supplemented by a supplemental detailed audit by the plaintiff in this case as auditor or bookkeeper, and this was dis-

cussed in detail by the trustees at the annual meeting. This was also sent to the advisory committee of the majority stockholders and approved, and this was done every year from [220] the time of the inception of the item until all the payments were covered.

You are instructed in this case that if you find that this was done and that these audits were made—and there is no testimony to the contrary—and were approved by the board of trustees at their annual meetings, as some testimony shows here that they were, and the plaintiff knew of them, of which there is no dispute—he said he did,—then the plaintiff cannot recover in this case for any of the 2½ per cent commissions that would be due to him on his 60 shares of stock, and if you find from the testimony in this case that these reports, this audit in the annual reports, were approved by the trustees, together with the supplemental reports, and were placed on file—and the testimony shows, you will remember what the testimony shows—it would seem to indicate that—then the plaintiff cannot recover for the 2½ per cent commission on the Miller stock; and in this connection I will say that it is competent for a board of trustees to agree to pay its officers any salary which they deem to be right so long as they act within the scope of honesty and the services that are rendered are commensurate with the salaries paid. No yardstick can be given to you, gentlemen of the jury, to fix the compensation which shall be commensurate for any given service. That must be determined by the testi-

mony and facts which have relation thereto; and if you believe from the evidence in this case that these reports were made—of which I say there is no dispute—and were discussed and considered by the board of trustees at their annual meetings and the plaintiff had knowledge of them, [221] which he says he did, then it is immaterial whether there was a formal resolution entered upon the minutes formally approving it.

Now, with relation to the 5 per cent commission, you are instructed that the plaintiff in this case would be entitled to recovery of his part or that part of the 5 per cent which would be charged against his 60 shares, unless the testimony shows that the services which were performed by the defendant were authorized and the compensation authorized by the board of trustees and the services were reasonably worth that amount. It is competent for the board of trustees,—it would be competent for the board of trustees in this case under the resolution of January 7, 1919, to pay or authorize payment of 5 per cent commission upon the distribution, if from the evidence you believe that this 5 per cent commission arrangement was inaugurated and agreed upon prior to that time and that the services—when I say "prior to that time" I mean at the time when they entered upon the liquidation and the defendant entered upon it with that understanding—and the services rendered were reasonably worth that sum, then he would be entitled to the full compensation. The burden is upon him to show that the service performed was reasonably worth the amount which the resolution that was passed

on the 7th of January authorized to pay. If he did not, if you are not satisfied by a fair preponderance of the evidence, then the plaintiff in this case would be entitled to recover two and a half a share—did you figure it out?

Mr. FISHBURNE.—Beg pardon, your Honor. [222]

The COURT.—It is two and a half a share?

Mr. FISHBURNE.—It would be two dollars and a half on the $500,000.

The COURT.—Two dollars and a half on the $500,000 that was distributed prior to the adoption of the resolution, and it was likewise when he drew his salary up to the 30th of November. In order for him to keep from paying the two and a half a share, the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders, and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover; but if you believe it was not worth that and that it was worth a less sum, then you must find for the plaintiff in such sum as you believe he ought to be credited on that stock.

Now, in considering the value of the services you should take into consideration the distribution or liquidation of all of the assets. It might be very easy and of little, comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal

more. So that in considering the compensation and reasonable value, you should take into consideration the entire estate in the liquidation.

I believe I have covered the law.

Gentlemen of the jury, it requires your entire number to agree upon a verdict, and when you have agreed you will cause the verdict to be signed by your foreman whom you [223] will elect immediately upon retirement to your jury-room. If you find for the plaintiff you will compute the sum that you find for him and write it in the blank form of the verdict. Then it will read:

"We the jury in the above-entitled cause find for the plaintiff and fix the amount in the sum of —— Dollars," and write in the amount, and if you find for the defendant, use this form:

"We the jury in the above-entitled cause find for the defendant."

Whichever verdict you find you will cause it to be signed by your foreman.

Are there any exceptions?

Mr. FISHBURNE.—I should like to make some exceptions at this time.

Plaintiff desires to except to that part of the Court's instructions holding that the claim of Miller and Denman are both barred by the statute of limitation; that is, that part prior to the years 1917.

The plaintiff further desires to except to the instructions with regard to that part of the instructions wherein you tell the jury that in considering the plaintiff's right to recover the defendant should be allowed a reasonable value for his service.

And we further except to that part of your Honor's instructions in which you exclude from the consideration of the jury and refuse to allow them to consider or take from their consideration the 4th cause of action, one of the assigned claims of Mr. Charles A. Miller. [224]

We further desire to except to that part of your Honor's instructions which modifies the right of the plaintiff to recover the $2.50 for the $500,000 which we claim was paid in September, by saying if the defendant was entitled to the reasonable value, that is if his services would be reasonably worth that, in that event he could not recover.

The COURT.—Yes, that is what I said.

Mr. FISHBURNE.—Now, may it please the Court we further desire to except to your Honor's refusal to grant and give the jury our instruction No. 1.

The COURT.—Did you file them with the clerk?

Mr. FISHBURNE.—I did not file them because the clerk said the rule did not require it.

The COURT.—You can file them and there will be no question about it.

Mr. FISHBURNE.—We except to your Honor's refusal to grant instruction No. 1.

We also desire to except to your Honor's refusal to give instruction No. 2 as asked for.

We also desire to except to your Honor's refusal to give our instruction No. 3.

And we also desire to except to your Honor's refusal to give No. 4, which has just been recently handed to you by Mr. Denman.

The COURT.—Exception to each of these. [225]

The instructions numbered 1, 2, 3 and 4 requested by the plaintiff and refused by the Court, to which refusal plaintiff excepted and his exceptions were allowed, are in the following language, to wit:

PLAINTIFF'S REQUESTED INSTRUCTION No. 1.

You are instructed that according to the articles of incorporation and by-laws of the Pacific Cold Storage Company the board of trustees alone have the power to fix the salaries of its officers, and that the plaintiff was one of the board of trustees and that if the defendant collected $18,000.00 from the accumulated profits of the Pacific Cold Storage Company without a prior resolution of the board of trustees authorizing him to do so the plaintiff is entitled to recover on his first and second causes of action.

PLAINTIFF'S REQUESTED INSTRUCTION No. 2.

You are instructed that for the month of September, 1918, the defendant Charles Richardson received a salary of $1,000.00 a month and that said defendant had no right or authority to collect from the shareholders $25,000.00 or five per cent of the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock of the company before September 30, 1918, and that the plaintiff is entitled to recover from the defendant on account thereof $2.50 a share or $150.00 on account of the third cause of action and $1995.00 on account of the fourth cause of action.

PLAINTIFF'S REQUESTED INSTRUCTION No. 3.

The law is that defendant Richardson while acting as trustee cannot receive any back pay for past services, and if any resolution was passed by the board of trustees in January [226] 1919 giving the defendant Richardson five per cent commission for converting the assets of the Pacific Cold Storage Company into money and liquidating the affairs of the corporation, the defendant cannot recover for any past services or any past liquidation of assets and can only recover for such sums, if any, as he liquidated after January 7, 1919.

PLAINTIFF'S REQUESTED INSTRUCTION No. 4.

You are instructed that the trustees and officers of the Pacific Cold Storage Company such as its president, vice-president, secretary, treasurer, etc., presumptively serve without compensation, and they are entitled to no compensation for performing the usual and ordinary duties pertaining to the office, in the absence of some express provision therefor by statute, charter, or by-laws, or by an agreement to that effect, and unless such provision or agreement was made and entered into before the services were rendered.

Mr. McCORD.—I just want, out of abundance of precaution,—I don't know whether my instructions were filed or not,— [227] but I want to except to the refusal of your Honor to give the 1st requested instruction, that is the one as to the instructed verdict.

We except to the refusal of the Court to give the 2d requested instruction, as requested.

The same as to three.

The same as to the fourth instruction.

The same as to the fifth.

The same as to the sixth, seventh, eighth, ninth and tenth; I except to each one separately as though had specifically and particularly.

The COURT.—I think I covered them all. Exception will be noted.

Mr. McCORD.—I want my exception to go to each separately, to each instruction separately.

The COURT.—Oh, yes.

JUROR.—The jury is somewhat in doubt as to part of your instruction. They want to know whether in your instructions you are instructing we can set the compensation for the defendant if we find that the compensation taken is excessive.

The COURT.—If you are satisfied that the compensation is excessive then you can assess to him—you should give the defendant such credit as he ought to have, and find for the plaintiff for the portion that would go to his stock.

JUROR.—Your Honor, in taking into consideration the Resolution of January 7, 1919, are we to consider that as legal approval?

The COURT.—You have the right to consider in passing upon the reasonableness of the service all ideas and all expressed conclusions of stockholders and other interested parties upon [228] the same relations that the plaintiff understood his. You have a right to consider what the majority

stockholders felt was reasonable compensation. You have a right to consider what the witnesses testified, who were stockholders, what they thought to be reasonable compensation.

ANOTHER JUROR.—May I ask a question? Now, in case—I am just suggesting—the jury decided that the defendant's compensation should be one-half of what has been given, now, will our decision override the action of the trustees, can we override by our decision upon the amount to be given? There is nothing in the verdict there that we are to render, no space for us to fill that in or anything of that kind.

The COURT.—After you have voted upon that you will find the amount that you feel that he ought to have,—that proportion of the per cent that he would have received if the defendant had not received the compensation which he did, and in determining what the services were reasonably worth you should take into consideration all of the evidence and what this advisory committee thought and what their testimony here shows in relation to that, and likewise the plaintiff's testimony as to what he thought reasonable benefits.

Mr. FISHBURNE.—May I ask your Honor a question? I want to ask if I understand that the jury can determine what is a reasonable amount to be allowed for the services of Mr. Richardson even if it should be different from what the trustees say? Can the jury under your instruction—

The COURT.—That is the juror's question before, and I answered it.

JUROR.—That is what I asked. [229]

The COURT.—And did I answer it?

JUROR.—Yes.

Mr. McCORD.—I think the instruction is probably correct upon the allowance of the $2.50, your Honor's instruction to the jury as to the allowance of the $2.50 per share on the Denman stock, relative to the 5 per cent commission paid Mr. Richardson, but I desire to except to that instruction because the Court said something that might not be clear,—I think it is confusing to the jury. The Court instructed them that they had the right to allow the plaintiff at the rate of $2.50 a share of the five per cent, or such other sum as the jury thought he ought to receive. It does not fix the standard by which the jury should determine.

The COURT.—Let me fix it this way: In view of the inquiry made and exceptions taken, you are instructed that if you should find from all the evidence that the defendant should not have been paid 5 per cent on the $500,000 that was distributed prior to the actual adoption of the resolution in January and checks sent out while he was receiving salary and believe that he should have simply received the salary, then you find for the plaintiff for $2.50 a share on his stock; and if you should find then that for the balance of the liquidation 5 per cent was reasonable compensation then that is all you can find for him; but if you are not satisfied that is sufficient, if you believe that the defendant should have been paid less than 5 per cent for the $500,000 distributed prior to the actual adoption

of the resolution, then you should find what per cent he should have been paid in addition to the $12,000 if any, and if you find any why then you will compute what is the balance of the per cent that you feel was overpaid [230] to him, what amount to apply to the stock owned by the plaintiff, and find your verdict for that amount.

Mr. McCORD.—I object to that, it is not limited to the amount he sued for.

The COURT.—No, he could not recover more than he sued for. Not to exceed the amount he sued for.

Mr. McCORD.—I object to your Honor's instructions, it seems to leave to the jury that they have the right to reach their conclusion irrespective of the testimony, as to what would be reasonable compensation. I understood that that was the inquiry and if the instruction justifies my construction of it why I would like to have the Court instruct the jury that they should be governed by the evidence and by the issues.

The COURT.—If the jury has the same idea that counsel has, I will say to you that jurors may not arbitrarily conclude upon any issue that is presented to them. While they are the sole judges of the facts in the case, they must conclude what the fact is upon the evidence which is presented and the weight that the jurors give to that testimony. That includes the oral testimony given from the witness-stand and likewise all paper documents that the Court had admitted in evidence, and all of those will be sent out with you to enable you to determine just what the facts are in the case.

Mr. FISHBURNE.—I also would ask that your Honor add that the rule governing—does not have to be bound by the oral testimony.

The COURT.—I have already instructed them on that.

Mr. FISHBURNE.—One other point: We desire to except to just that part of the instructions with regard to the jury being allowed to fix a reasonable amount and ask again that [231] your Honor should give that instruction as I asked for. I think we are entitled to a flat $2.50 per share.

The COURT.—Note exception.

(Jury retired.) [232]

Certificate of Judge to Bill of Exceptions.

Now, in furtherance of justice and that right may be done, plaintiff, Frederick L. Denman, tenders and presents the foregoing as his bill of exceptions in this case to the actions and ruling of the Court and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record and certified by the Court to be the evidence at said trial material to this appeal except the exhibits, and to be a true bill of exceptions.

The same is accordingly done and certified this 17th day of Jan., 1923.

JEREMIAH NETERER,
Trial Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Jan. 18, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [233]

Assignment of Errors Accompanying Petition for Writ of Error.

The above-named plaintiff, in connection with his petition for writ of errors, makes the following assignments of error, which he avers occurred in the rulings, orders, judgment, trial and conduct of the above-entitled cause by the above-entitled court, to wit:

1.

The Court erred in denying plaintiff's motion to strike the third and fifth affirmative defenses of the answer of the defendant to plaintiff's seventh amended complaint on the ground that said defenses were sham, frivolous, irrelevant and redundant.

2.

The Court erred in requiring Mr. Denman to testify as to the report and supplemental sheet and information sent by him to the advisory board on the ground that there was nothing to show the creation of such board by the by-laws or action of the trustees of the Pacific Cold Storage Company.

3.

The Court erred in allowing the introduction of any testimony with regard to the advisory board on the ground that there is nothing to show by the articles of incorporation, by-laws or actions of the trustees or stockholders of the Pacific Cold Storage

Company, the creation of said advisory board. [234]

4.

The Court erred in requiring Mr. Denman to testify as to the knowledge of the board of trustees in 1918 or the conversation of such board with regard to the five per cent commission of Charles Richardson on the ground that is is incompetent, irrelevant and immaterial unless the board authorized the five per cent by resolution or in some other legal manner, and that it is immaterial whether or not these men knew in an informal way of said five per cent commission.

5.

The Court erred in excluding evidence offered by Mr. Fishburne that one of the members of the board of trustees in January, 1919, was the president of the bank in which the defendant was director, and that another, Mr. Harold Seddon, was put on the board by Mr. Richardson and that Mr. Moore, another member of the board, was working for the company as bookkeeper, and Mr. Davis was working for the company, and that three or four of the trustees in all were employees of Mr. Richardson working at the Pacific Cold Storage Company and that all of their jobs depended on Mr. Richardson, on the ground that such testimony was material to the issues of this case.

6.

The Court erred in excluding the evidence offered by Mr. Fishburne to prove that a majority of the board of trustees on January 7, 1919, were employees

of Mr. Richardson, owed their jobs to him or were working for the bank of which he was a director.

7.

The Court erred in excluding the evidence that at the time Mr. Miller seconded the motion for a five per cent [235] commission, the witness did not know that Mr. Richardson was getting $1,000.00 a month prior to January 7, 1919, or the two and one-half per cent commission, and that the witness was taken by surprise when he seconded the resolution on the ground that such lack of knowledge and surprise negatived the defense of estoppel.

8.

The Court erred in excluding that part of the first and second causes of action of the plaintiff running back of January 1, 1917, on the ground that it was not barred by the statute of limitations because of the fact that the defendant was a trustee and it was a continuing trust and payments from year to year down to the year of bringing this suit were made under such trust, and the statute of limitations does not run against the *cestui que trust* in favor of the trustee until the trust has been repudiated by the trustee and repudiation brought to the attention of the *cestui que trust.*

9.

The Court erred in excluding the claim of Mr. Miller for the five per cent commission on the ground that under the doctrine of estoppel a man cannot acquire property unlawfully and then set up his own wrong and try to estop an innocent person because he said he was misled, the law being

that estoppel cannot be plead in favor of a man's own fraud.

10.

The Court erred in its ruling on defendant's motion for nonsuit and in his statement of such ruling to the jury in allowing the defendant an offset to plaintiff's suit of a reasonable conpensation for defendant's services, on the ground that the trustees were not given such authority in the [236] resolution empowering them to liquidate the company and that the trustees had no power to delegate their authority to Richardson and that the trustees had no authority to allow Richardson compensation for back pay, and on the ground that neither the president nor trustee of a corporation is entitled to compensation on a *quantum meruit* or for reasonable compensation for his services and can only be compensated on an express agreement entered into with him in advance of his services.

11.

The Court erred in not stating to the jury when he ruled on the motion of defendant for a nonsuit that the defendant would be entitled to a credit for the reasonable value of the service which he performed after he ceased to receive the salary that was paid him, on the ground that neither the president nor trustee of a corporation is entitled to compensation for his services unless such compensation is agreed upon in advance by a resolution of the board of trustees and an agreement with the corporation and the officer performing the services

made in advance of the performance of such services.

12.

The Court erred in his statement to the jury on his ruling on the motion of defendant for a nonsuit in not instructing the jury that there was no liquidation of assets other than bankable paper after January 7, 1919, and in not instructing the jury that there was no resolution allowing the defendant any salary after September 30, 1919, and that the resolution of January 7, 1919, called for back pay and was hence void. [237]

13.

The Court erred in overruling the objection by the plaintiff to the introduction of any evidence by the defendant on the ground that the answer showed no legal defense in law.

14.

The Court erred in not giving the plaintiff judgment on the pleadings on the ground that there was no defense shown and no authority for the advisory board and no legal authority shown for any action of the board of trustees of the Pacific Cold Storage Company.

15.

The Court erred in allowing the defendant to prove the facts relating to the formation and organization of the advisory board on the ground that it is incompetent, irrelevant, and immaterial and there was nothing shown by the articles of incorporation, by-laws or minutes of the Pacific Cold Storage Company authorizing or creating such ad-

visory board and nothing shown by the minutes or verbally that a majority or any other number of the stockholders of the Pacific Cold Storage Company or the trustees or majority of the trustees authorized the creation of such advisory board.

16.

The Court erred in admitting Defendant's Exhibits 15–A, 16–A, 17–A and 18–A, all letters and correspondence and reports between Richardson and the advisory board, on the ground that there was shown no legal authority for the advisory board and that what transpired between the board and the defendant Richardson was *res inter alios acta.*

17.

The Court erred in allowing the defendant to testify that all of the other American stockholders consented to the five [238] per cent commission on the ground that if this money was wrongfully taken from plaintiff it was immaterial that other stockholders consented to the wrong.

18.

The Court erred in allowing the defendant Richardson to testify that it was reasonably worth $100,000 to convert the assets of the Pacific Cold Storage Company into money and distribute them back to the stockholders, on the ground that it was incompetent, irrelevant and immaterial and that the defendant was not entitled to recover for reasonable compensation or any compensation unless legally authorized to receive same in advance by the board of trustees of the corporation.

19.

The Court erred in allowing the defendant to testify that Inglis, the secretary of the advisory board, distributed circulars like the one marked Exhibit 20–A to the stockholders, on the ground that there was nothing to show that the defendant knew of his own knowledge that said circulars were distributed and that it was therefore hearsay evidence.

20.

The Court erred in admitting Exhibit 20–A, the circular alleged to have been distributed by the secretary of the advisory board, on the ground that there is no competent evidence to show that such circular had ever been distributed.

21.

The Court erred in allowing Mr. Richardson to testify as to any discussion of the board of trustees as to the five per cent commission on the ground that the witness stated there was no resolution allowing the five per cent commission and that mere informal meetings of the board of trustees are [239] not sufficient.

22.

The Court erred in allowing Mr. Moore to testify as to the informal conversations of the board of trustees with regard to the five per cent commission of the defendant, on the ground that the witness did not show the date of such conversations and did not show any resolution to that effect, and on the ground that it was incompetent, irrelevant and immaterial.

23.

The Court erred in admitting Exhibits 21–A and 22–A on the ground that it was correspondence between Richardson and Inglis the secretary of the advisory board, and that there was nothing to show that the advisory board had been legally created and that it was *res inter alios acta.*

24.

The Court erred in admitting the testimony of L. R. Manning that ten per cent would be a reasonable commission for the services of the defendant in liquidating the assets of the Pacific Cold Storage Company and returning them to the stockholders.

25.

The Court erred in admitting the testimony of Chester Thorne that ten per cent was a reasonable compensation for the defendant's services in liquidating the assets of the Pacific Cold Storage Company and returning them to the stockholders, that is, ten per cent of $1,300,000.

26.

The Court erred in admitting the testimony of Eugene Wilson that he thought ten per cent of $1,300,000 would be very [240] reasonable compensation for the services of the defendant in liquidating the assets of the Pacific Cold Storage Company and returning them to its stockholders.

27.

The Court erred in admitting the testimony of Rufus Davis that he considered five per cent commission a reasonable sum for the services of the defendant for liquidating the assets of the Pacific

Cold Storage Company and returning them to its stockholders.

28.

The Court erred in admitting the testimony of Ralph F. Stacy that he considered five per cent commission a reasonable sum to allow the defendant for his services in liquidating the assets of the Pacific Cold Storage Company and returning them to its stockholders.

29.

The Court erred in admitting the testimony of the defendant that it was reasonably worth ten per cent or something like $100,000 to convert the assets of the Pacific Cold Storage Company into money and distribute them back to the stockholders.

30.

The Court erred in the admission of the testimony of all the witnesses mentioned in the six preceding assignments as to what would be reasonable compensation for the services of the defendant Richardson in liquidating the Pacific Cold Storage Company and returning its assets to its stockholders on the ground that the defendant Richardson would not be entitled to be allowed any compensation for services either as president or trustee of the Pacific Cold Storage Company unless [241] such compensation had been authorized by resolution of the board of trustees prior to the rendition of such services by said Richardson as president or trustee.

31.

The Court erred in the admission of the testimony of the witnesses mentioned in assignments 24

to 29, inclusive, on the ground that the admission of such evidence negatives and ignores the rule of law forbidding the president or trustee of a corporation from receiving compensation for services for back pay, that is to say, services rendered to a corporation prior to the due and legal authorization of compensation for such services by the board of trustees of the corporation.

32.

The Court erred in allowing Rufus Davis to testify that the liquidation of the Pacific Cold Storage Company was a good liquidation on the ground that it is incompetent, irrelevant and immaterial.

33.

The Court erred in not striking all of the testimony of Rufus Davis relating to the five per cent commission on the ground that it was not shown that there was any formal resolution authorizing the payment of the five per cent commission to Richardson prior to the performance of his duties, and on the further ground that at the time he performed the services for which he is claiming the five per cent commission he was receiving a salary from the Pacific Cold Storage Company.

34.

The Court erred in allowing L. R. Manning, Chester Thorne, Ralph F. Stacy, Eugene Wilson, Rufus Davis and Charles Richardson and each one of them to testify as to what was a reasonable [242] compensation to be allowed the defendant for his services in liquidating the Pacific Cold Storage Company and returning its assets to its stockholders, on

the ground that during practically all the time that he was rendering the services for which he is claiming the compensation of five per cent he was being paid by the Pacific Cold Storage Company his regular salary.

35.

The Court erred in refusing to give plaintiff's requested instruction No. 1 in the following language, to wit:

> "You are instructed that according to the articles of incorporation and by-laws of the Pacific Cold Storage Company the board of trustees alone have the power to fix the salaries of its officers, and that the plaintiff was one of the board of trustees and that if the defendant collected $18,000.00 from the accumulated profits of the Pacific Cold Storage Company without a prior resolution of the board of trustees authorizing him to do so, the plaintiff is entitled to recover on his first and second causes of action."

on the ground that the defendant was not entitled to said compensation unless he was by prior resolution of the board authorized to receive same, and on the further ground that the Court's instructions regarding the two and one-half per cent commission ignored and negatived the rule of law requiring a resolution authorizing compensation to an officer for his services prior to the rendition of such services.

36.

The Court erred in refusing to give plaintiff's re-

quested instruction No. 2 in the following language, to wit:

> "You are instructed that for the month of September, 1918, [243] the defendant Charles Richardson received a salary of $1,000 a month and that said defendant had no right or authority to collect from the shareholders $25,000.00 or five per cent of the $500,000.00 liquidated and returned by the trustees as a reduction of the capital stock of the company before September 30, 1918, and that the plaintiff is entitled to recover from the defendant on account thereof $2.50 a share or $150.00 on account of the third cause of action and $1995.00 on account of the fourth cause of action."

on the ground that the undisputed evidence showed that on September 15, 1918, the capital stock of the Pacific Cold Storage Company had been reduced $500,000 and the proportion of same belonging to the American stockholders was all returned to them on that date and that the defendant Charles Richardson was at the time of said reduction receiving a salary of $1,000 a month and was therefore not entitled to any extra compensation whatever for the liquidation and return of said $500,000.

37.

The Court erred in refusing to give plaintiff's requested instruction No. 3 in the following language, to wit:

> "The law is that defendant Richardson while acting as trustee cannot receive any back pay for past services, and if any resolution was

passed by the board of trustees in January, 1919 giving the defendant Richardson five per cent commission for converting the assets of the Pacific Cold Storage Company into money and liquidating the affairs of the corporation, the defendant cannot recover for any past services or any past liquidation of assets and can only recover for such sums, if any, as he liquidated after January 7, 1919."

on the ground that there is nothing in the record to show that [244] there was any written or verbal resolution by the board of trustees of the Pacific Cold Storage Company to allow the defendant the compensation of five per cent for his services in liquidating the assets of said company and returning same to stockholders prior to the resolution of January 7, 1919, and that the evidence shows that the defendant's compensation was for services rendered prior to January 7, 1919.

38.

The Court erred in refusing to give plaintiff's requested instruction No. 4 in the following language, to wit:

"You are instructed that the trustees and officers of the Pacific Cold Storage Company such as its president, vice-president, secretary, treasurer, etc., presumptively serve without compensation, and they are entitled to no compensation for performing the usual and ordinary duties pertaining to the office, in the absence of some express provision therefor by statute, charter, or by-laws, or by an agreement

to that effect, and unless such provision or agreement was made and entered into before the services were rendered."

on the ground that the defendant is not entitled to compensation for back pay nor entitled to extra compensation for services rendered while he is already receiving a salary for such services, and on the further ground that the Court by his instructions as to allowing the defendant a reasonable compensation for his services overrides and negatives the rule of law requiring a prior resolution of the board of trustees for the compensation of its duly appointed officers or trustees.

39.

The Court erred in holding that the claims of Miller and Denman on the two and one-half per cent commission were barred [245] prior to the year 1917, on the ground that the resolution existing between the plaintiff and defendant was that of a continuing trust from 1912 to 1918 and that the payments made to defendant from 1912 to and including 1918 were payments made to the defendant as trustee and that the statute of limitations did not run in favor of the defendant Richardson and against the plaintiff Denman until the trust relation was ended by the plaintiff demanding from the defendant the amount due him under the trust and a denial and repudiation on the part of the defendant of said trust.

40.

The Court erred in that part of his instruction with relation to the five per cent commission where

he said: "It would be competent for the board of trustees in this case under the resolution of January 7, 1919, to pay or authorize payment of five per cent commission upon the distribution, if from the evidence you believe that this five per cent commission arrangement was inaugurated and agreed upon prior to that time, and that the services—when I say prior to that time I mean at the time when they entered upon the liquidation and the defendant entered upon it with that understanding,—and the services rendered were reasonably worth that sum, then he would be entitled to the full compensation. The burden is upon him to show that the service performed was reasonably worth the amount which the resolution that was passed on the 7th of January authorized to pay. If he did not, if you are not satisfied by a fair preponderance of the evidence, then the plaintiff in this case would be entitled to recover $2.50 a share. * * *

"On the $500,000 that was distributed prior to the adoption [246] of the resolution, and it was likewise when he drew his salary up to the 30th of November. In order for him to keep from paying the $2.50 a share the defendant must show to you by the fair preponderance of the evidence that the service performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover, but if you believe it was not worth that and that it was worth a less sum,

then you must find for the plaintiff in such sum as you believe he ought to be credited on that stock. Now, in considering the value of the services you should take into consideration the distribution or liquidation of all the assets. It might be very easy and of comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more. So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation."

41.

The Court erred in giving the instruction set forth in the preceding assignment of error on the ground that what the services of the defendant were reasonably worth is immaterial to the issues of this cause.

42.

The Court erred in instructing the jury that "in order for him (the defendant) to keep from paying the $2.50 a share (the commission paid the defendant on the $500,000 stock reduced and *return* in September, 1918) the defendant must show to you by the fair preponderance of the evidence that the service [247] performed by him in the liquidation of this concern was five per cent of the amount returned to the stockholders and the salary paid to the 31st of September, 1918, if you believe by a fair preponderance of the evidence that it was worth that, the plaintiff cannot recover; but if you believe it was not worth that and that it was worth a less sum, then you must find for the plaintiff in

such sum as you believe he ought to be credited on that stock.

"Now, in considering the value of the services you should take into consideration the distribution or liquidation of all of the assets. It might be very easy and of little, comparatively little labor or service to distribute the first part, the first $500,000, and then the after $500,000 might be worth a great deal more. So that in considering the compensation and reasonable value you should take into consideration the entire estate in the liquidation."

43.

The Court erred in modifying the right of the plaintiff to recover $2.50 a share on account of the commission collected by the defendant for the return of $500,000 of the capital stock in September, 1918, by saying: "If the defendant was entitled to the reasonable value, that is, if his services would be reasonably worth that, in that event the plaintiff could not recover," on the ground that there is nothing in the record to show that the defendant was entitled to be paid the five per cent commission or the $2.50 a share for the $500,000 capital reduced and returned to the stockholders in September, 1918.

44.

The Court erred in excluding from the consideration of [248] the jury the fourth cause of action, the assigned claim of Miller, for the recovery of the five per cent commission on the ground that according to the offer of proof Charles A. Miller at the time of the seconding of the resolution allowing said five per cent did not know that Richardson

had been receiving a salary of $1,000.00 a month and two and one-half per cent commission on the dividends returned and that said Miller was taken by surprise and could not, therefore, be estopped, and on the further ground that the defendant could not plead an estoppel to his own wrong, and that an estoppel cannot be used to perpetuate a fraud.

45.

The Court erred in instructing the jury, "You have the right to consider in passing upon the reasonableness of the services all ideas and all expressed conclusions of stockholders and other interested parties upon the same relations that the plaintiff understood his. You have a right to consider what the majority stockholders felt was reasonable compensation. You have a right to consider what the witnesses testified who were stockholders what they thought to be reasonable compensation," on the ground that what was reasonable compensation was not at issue in this action, and the sole question was whether or not there had been a resolution by the board of trustees authorizing the payment to defendant of the five per cent commission prior to the rendition of the services by the defendant, and on the further ground that what the majority stockholders felt or thought to be reasonable compensation was incompetent, irrelevant and immaterial and inadmissible. [249]

46.

The Court erred in making and entering the judgment on the verdict of the jury for the defendant.

47.

The Court erred in denying the plaintiff's motion for new trial herein.

48.

The Court erred in instructing the jury that "If you are satisfied that the compensation is excessive then you can assess it to him—you should give the defendant such credit as he ought to have and find for the plaintiff for the portion that would go to his stock."

49.

The Court erred in instructing the jury that "After you have voted upon that you will find the amount that you feel that he (the plaintiff) ought to have,—that proportion of the per cent that he would have received if the defendant had not received the compensation which he did, and in determining what the services were reasonably worth you should take into consideration all of the evidence and what this advisory committee thought and what their testimony here shows in relation to that, and likewise the plaintiff's testimony as to what he thought reasonable benefits."

50.

The Court erred in instructing the jury that "In view of the inquiry made and exceptions taken, you are instructed that if you should find from all the evidence that the defendant should not have been paid 5 per cent on the $500,000 that was distributed prior to the actual adoption of the resolution in January and checks sent out while he was receiving salary and believe that he should have

simply received the salary, then [250] you find for the plaintiff for $2.50 a share on his stock; and if you should find then that for the balance of the liquidation 5 per cent was reasonable compensation then that is all you can find for him; but if you are not satisfied that is sufficient, if you believe that the defendant should have been paid less than 5 per cent for the $500,000 distributed prior to the actual adoption of the resolution, then you should find what per cent he should have been paid in addition to the $12,000 if any, and if you find any then you will compute what is the balance of the per cent that you feel was overpaid to him, what amount to apply to the stock owned by the plaintiff, and find your verdict for that amount." [251]

WHEREFORE the said Frederick L. Denman, plaintiff in error, prays that the judgment of the District Court of the United States for the Western District of Washington, Southern Division, in this case entered, be reversed and that said District Court be directed to grant a new trial of said cause.

G. P. FISHBURNE,
Attorney for Plaintiff in Error.

Service of the foregoing assignment of errors acknowledged this 8th day of Jan., 1923.

KERR, McCORD & IVEY,
Attorneys for Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [252]

Petition for Writ of Error.

Now comes the plaintiff Frederick L. Denman, and says:

That on or about the 19th day of December, 1922, the above-entitled court entered judgment on the verdict in favor of defendant and against the plaintiff dismissing the above-entitled action and giving defendant judgment for his costs herein, in which judgment and the proceedings had prior thereto in this cause certain errors were by the Court committed to the prejudice of this plaintiff that in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE the above-named plaintiff prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of and that a transcript of the record, proceedings, and papers in this cause together with the original exhibits duly authenticated may be sent to said Circuit Court of Appeals.

G. P. FISHBURNE,
A. H. DENMAN,
Attorneys for Plaintiff. [253]

United States of America,
Western District of Washington,
Southern Division,—ss.

We, the undersigned attorneys of record for the defendant in the above-entitled cause, hereby acknowledge due service of the above petition for

writ of error and assignment of error and receipt of a copy of said petition and assignments this 8th day of Jan., 1923.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [254]

Order Allowing Writ of Error.

On this 8th day of January, 1923, came the plaintiff Frederick L. Denman by his attorneys and filed herein and presented to the Court his petition praying for the allowance of a writ of error together with assignment of errors intended to be urged by him praying also for a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that a writ of error as prayed for by the plaintiff be and the same is hereby allowed and the amount of bond on said writ of error be and is hereby fixed at Seven Hundred Fifty Dollars.

Done in open court this 8th day of January, 1923.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1823. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [255]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Frederick L. Denman, the above-named plaintiff, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto Charles Richardson, the above-named defendant, in the sum of Seven Hundred and Fifty & 00/100 Dollars, to be paid to the said defendant, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and firmly by these presents.

Sealed with our seals and dated the 17th day of January, 1922.

WHEREAS the above-named plaintiff has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in the above-entitled cause by the above-entitled court, and to get a new trial,

NOW, THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute said writ to effect and answer all costs and damages, if he shall fail to make good

his plea, then the obligation shall be void; otherwise to remain in full force and virtue.

FREDERICK L. DENMAN,
Principal.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

[Seal] By H. T. HANSON,
Its Attorney-in-fact,
Surety.

The above bond is approved both as to sufficiency and form this 22d day of January, 1923.

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 23, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [256]

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America:
To the Honorable Judge of the District Court of the United States for the Western District of Washington, Southern Division:

Because in the records and proceedings, as also in the rendition of judgment of a plea, which is in the said District Court before you, between Frederick L. Denman, as plaintiff, and Charles Richardson, as defendant, a manifest error hath happened,

to the great damage of the said plaintiff as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, in said Circuit on the 5th day of February, 1923, in the said Circuit Court of Appeals to be then and there held, that the record and [257] proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 8th day of January, 1922.

[Seal of U. S. Court]

F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington.

Allowed this 8th day of Feb., 1923, after the plaintiff in error had filed with the clerk of this

Court with his petition for a writ of error, his assignment of errors.

JEREMIAH NETERER,

Judge of the District Court of the United States, for the Western District of Washington, Southern Division.

Service accepted Jan. 8, 1923.

KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [258]

Stipulation Re Transmission of Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED by and between G. F. Fishburne and A. H. Denman, attorneys for the plaintiff, and E. S. McCord, attorney for defendant, that the original exhibits offered in evidence in the trial of the above-entitled action may be transmitted to the United States Circuit Court of Appeals at San Francisco, California, and need not be copied in the transcript of record. An appropriate order therefor shall be entered by the Court and said exhibits and a copy of such order of the court and this

stipulation shall be transmitted to the Appellate Court.

A. H. DENMAN,
G. P. FISHBURNE,
Attorneys for Plaintiff.
KERR, McCORD & IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 31, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [259]

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please transmit the exhibits with the stipulation and order concerning same to the Clerk of the United States Circuit Court of Appeals of the Ninth Circuit, at San Francisco, California, and prepare and certify to constitute the record on appeal in the above-entitled action typewritten copies of the following papers, omitting all the captions (except the titles of original complaint and the seventh amended complaint), omitting also all the verifications, acceptances of service (except those on the petition for writ of error, assignments of error, citation on writ of error and writ of error) and other endorsements (except the file-marks), said transcript of record to be forwarded to and filed in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, to be

printed there according to the rules of said Circuit Court of Appeals:

Original complaint and answer.

All amended complaints.

All demurrers and orders overruling and sustaining same.

Original answer and amended answer to seventh amended complaint.

Verdict of the jury.

Judgment on verdict.

Motion for new trial.

Order overruling the same.

Stipulation extending time for perfecting appeal to March 25, 1923.

Order on said stipulation.

Bill of exceptions. [260]

Petition for writ of error.

Assignments of error.

Order allowing writ of error.

Bond on writ of error.

Citation on writ of error.

Writ of error.

Stipulations as to exhibits and orders as to same.

Motion to make more definite and certain and strike original answer to seventh amended complaint filed April 11, 1922, and order on said motion of May 8, 1922.

You are further instructed to request the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit not to include in the printed record the amended complaints from 1 to 6, nor the amended answers except the last amended answer,

if the same be consistent with the rules of the court.

G. P. FISHBURNE and
A. H. DENMAN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 31, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [261]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing and within typewritten pages, numbered from 1 to 266, is a full, true and correct copy of the record and proceedings in the case of Frederick L. Denman, Plaintiff, versus Charles Richardson, Defendant, in Cause No. 2791 in said District Court, as required by praecipe of counsel filed and shown herein, as the originals appear on file and of record in my office in said District of Tacoma, and that the same constitutes my return on the annexed writ of error herein.

I further certify and return that I hereto attach and herewith transmit the original writ of

error and the original citation on writ of error herein, together with acceptances of service thereon.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office on behalf of the plaintiff in error for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Sec. 828 R. S. U. S.) for making record and return, 635 folios @ 15¢ each	$95.25
Certificate of Clerk to Transcript of the Record, 3 folios @ 15¢ each	.45
Seal to said Certificate	.20

[262]

ATTEST my hand and the seal of said District Court at Tacoma, in said District, this 10th day of March, A. D. 1923.

[Seal] F. M. HARSHBERGER,
Clerk.
By Alice Higgins,
Deputy Clerk. [263]

Citation on Writ of Error.

United States of America,—ss.

To Charles Richardson and His Attorneys of Record, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be

holden at the City of San Francisco, State of California, in said Circuit, on the 5th day of February, 1923, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Frederick L. Denman is plaintiff in error and Charles Richardson is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, this 8th day of January, 1923.

[Seal of U. S. Court]

JEREMIAH NETERER,
Judge.

United States of America,
Western District of Washington,
Southern Division,—ss.

We, the undersigned attorneys of record for the defendant in error in the above-entitled cause, hereby acknowledge due service of the above citation and receipt of a copy of said citation this 8th day of Jan., 1923.

KERR, McCORD & IVEY,
Attorneys for Defendant in Error.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [264]

Stipulation Re Original Exhibits.

IT IS HEREBY STIPULATED by and between G. P. Fishburne, attorney for plaintiff, and Kerr, McCord & Ivey, attorneys for the defendant, that the original exhibits and a copy of the order to transmit same may be sent to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, California, by the Clerk of the above-entitled court on or before the day set for the hearing of the oral argument by the said United States Circuit Court of Appeals, and as soon as the attorneys for the defendant have finished with said exhibits in the preparation of their answering brief.

IT IS FURTHER STIPULATED that the copy of said order by the above-entitled court and transmitting said exhibits need not be printed in the transcript of record.

A. H. DENMAN,
G. P. FISHBURNE,
Attorneys for Plaintiff.
KERR, McCORD & IVEY,
By J. N. IVEY,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 9, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [265]

Order Re Forwarding Original Exhibits.

Agreeably to the written stipulation of the parties heretofore filed in this action, and it being deemed proper by the Presiding Judge,—

IT IS HEREBY ORDERED that none of the original exhibits need be copied in the transcript of record and that all of the original exhibits of the plaintiff, being from 1 to 20, both inclusive, and all of the original exhibits of the defendant, being from 1–A to 24–A, both inclusive, be forwarded by the Clerk of this court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 8th day of March, 1923.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 9, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [266]

[Endorsed]: No. 3993. United States Circuit Court of Appeals for the Ninth Circuit. F. L. Denman, Plaintiff in Error, vs. Charles Richardson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court

of the Western District of Washington, Southern Division.

Filed March 13, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States, Western District of Washington, Southern Division.

No. 2791.

FREDERICK L. DENMAN,

Plaintiff,

vs.

CHARLES RICHARDSON,

Defendant.

Order Extending Time to and Including March 15, 1923, to File Record and Docket Cause.

The Court having considered the stipulation herein,—

WHEREFORE IT IS ORDERED that the time for the return day of the writ of error and the citation and for settling the bill of exceptions and for filing the record and docketing in the above-entitled action with the Clerk of the United States Circuit Court of Appeals be and hereby is extended and enlarged to and including the 15th day of March, 1923.

Done in open court this 8th day of January, 1923.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 8, 1923. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy.

No. 3993. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including March 15, 1923, to File Record and Docket Cause. Filed Feb. 23, 1923. F. D. Monckton, Clerk. Refiled Mar. 13, 1923. F. D. Monckton, Clerk.